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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

COFFEE COUNTY, TENNESSEE, *Petitioner*

v.

CITY OF TULLAHOMA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this cause.

OPINIONS BELOW

The opinion of the District Court is reported in 204 F. Supp. 794 (1962) and is also printed in the record (R. 34).

The majority opinion of the Court of Appeals and the dissenting opinion of Judge Weick (*infra*, Appen-

dix A, pp. 1a-22a) is unreported but appear in the record (R. 99).

JURISDICTION

The judgment of the Court of Appeals was entered May 14, 1964 (*infra,* Appendix B, pp. 23a-24a).

Jurisdiction to issue the writ rests on Title 28, USCA, Section 1254(1) and Title 28 USCA, Section 1651.

QUESTIONS PRESENTED

1. Does the Tennessee Valley Authority Act of 1933, as amended, (16 USCA Sec. 831-L), obligate a city, operating its own power distribution system and purchasing from Tennessee Valley Authority, to pay to the county in which the city operates all or part of the moneys which the city takes from its distribution system and places in its general fund and which are calculated by applying the county tax rate to the value of the electric distribution properties?

2. Whether the respondent city is required by contract with Tennessee Valley Authority executed under the provisions of the Tennessee Valley Authority Act of 1933, as amended, (16 USCA Sec. 831-L), to distribute to the petitioner county such part of the payments in lieu of taxes paid into respondent's general fund by respondent's municipal power distributor, as are calculated by application of the prevailing county tax rate to the value of the system?

3. Is a city who purchases power from the Tennessee Valley Authority by contract executed under provisions of the Tennessee Valley Authority Act of 1933, as amended, (16 USCA, Sec. 831-L), obligated to distribute to a county in which the city operates such part of the payments in lieu of taxes paid into the city gen-

eral fund as are calculated by application of the prevailing county tax rate to the value of the system, without implementation?

STATUTES INVOLVED

The statutes involved are set out in Appendix C, *infra,* p. 25a.

STATEMENT OF THE CASE

The City of Tullahoma, Tennessee, Respondent, (hereinafter sometimes called "The City"), is situated in Coffee County, Tennessee, Petitioner, (hereinafter sometimes called "The County"). The City does now and has for many years owned and operated an electrical distribution system (R. 32). That system is administered and operated under a separate agency of the City known as its "Board of Public Utilities". A statute of the State of Tennessee, to-wit: Tennessee Code Annotated, Section 6-1316, exempts the property and revenues of municipal electric distribution systems from all state, county and municipal taxation. Thus by setting up its municipally owned electrical distribution system the City has never paid to the County taxes or tax equivalents and the City has thereby removed from county taxation certain property which would otherwise be subject to county taxes.

On July 1, 1947, effective January 1, 1949, the City entered into a contract with Tennessee Valley Authority (sometimes hereinafter called T.V.A.), (R. 13), under the terms and provisions of the Tennessee Valley Authority Act of 1933, as amended, (16 USCA Sec. 831-L). Said contract provides for the purchase by the City of its wholesale electric power supply from TVA (R. 13).

The City submitted the actual control of the operation of its municipal electrical distribution system to the TVA under the indirect device of said power purchase contract.

The City immediately began to collect from the revenues of the municipal electric distribution system, as it was authorized by the aforesaid contract to do, certain funds in lieu of all taxes, both municipal and county, upon said system. The sums so collected by the City were calculated by applying prevailing municipal and county property tax rates to the value of the electric system (R. 32). Such practice on the part of the City continued until during the calendar year 1959, when the County made demand for that portion of the fund placed into the general fund of the City under said contract calculated by means of the county tax rate for the year 1959 and in the amount of $27,892.76. The County bases its demand under a provision of the Tennessee Valley Authority Act, as amended in 1940, which provision (now a portion of 16 USCA Sec. 831-L) is as follows:

> "Nothing herein shall be construed to limit the authority of the Corporation in its contracts for the sale of power to municipalities, to permit or provide for the resale of power at rates which may include an amount to cover tax-equivalent payments to the municipality in lieu of State, county, and municipal taxes upon any distribution system or property owned by the municipality, or any agency thereof, conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes upon any such distribution system or property; it being the intention of Congress that either the municipality or the States in which the municipality is situated shall provide for the proper

distribution to the State and county of any portion of tax equivalent so collected by the municipality in lieu of State or county taxes upon any such distribution system or property.

The Corporation shall, not later than January 1, 1945, submit to the Congress a report on the operation of the provisions of this section, including a statement of the distribution to the various States and counties hereunder; the effect of the operation of the provisions of this section on State and local finances; an appraisal of the benefits of the program of the Corporation to the States and counties receiving payments hereunder, and the effect of such benefits increasing taxable values within such States and counties; and such other data, information, and recommendations as may be pertinent to future legislation."

The City denied the County's right to said funds and on December 22, 1959 filed its suit in the Federal District Court for the Eastern District of the State of Tennessee against the County for a declaratory judgment, requesting the court to construe the statute as not requiring the City to pay to the County any moneys which the City has taken from the municipal electric distribution system and paid into the City's general fund.

The District Court held (1) that under the Tennessee Valley Authority Act of 1933, as amended, the city which operates its own electric distribution system and purchases its electric power from the Tennessee Valley Authority, is obligated to pay to the county certain tax equivalents which are taken from revenues of the City's electric department and placed in its general funds, and (2) that under the Act the Tennessee Valley Authority is required to include in its contra s

with cities provisions implementing such statutory obligation. (R. 34-47)

The United States Court of Appeals for the Sixth Circuit (sometimes hereinafter called the lower court), upon the City's appeal, reversed the District Court (R. 113), one judge dissenting (R. 116).

REASONS FOR GRANTING THE WRIT

I. The decree of the court below is in conflict with a prior decision of the Supreme Court of the State of Tennessee, the court of last resort of that state.

The court below made slight mention of a case determined by the Supreme Court of the State of Tennessee, in which case that court settled that the determinative question was the proper construction of the 1940 amendment to Section 13 of the TVA Act. *Rutherford County* v. *City of Murfreesboro,* 205 Tenn. 362, 326 SW 2d 653, cert. den., 361 US 919.

That court (Supreme Court of Tennessee) after considering a contract between the City of Murfreesboro and TVA, which contract was substantially identical to the contract here, stated that the 1940 amendment to the TVA Act had as its purpose to require:

> "That the municipality must distribute these tax equivalents fairly and as a replacement of lost taxes as among the several governmental units; otherwise the municipality will be allowed to make a profit on the operation by collecting those tax equivalents and retaining all of them for itself." *Rutherford County* v. *Murfreesboro, supra.*

The Supreme Court of Tennessee further held in said case that the congressional intent expressed by the 1940 amendment is:

> "That TVA has a discretion in making such contracts with municipalities either to include a pro-

vision for tax equivalent payments as therein described or to omit any such provision; but if such a provision be included, it must be conditioned upon a proper distribution by the municipality of any such amounts collected in lieu of state or county taxes upon any such distribution system or property." *Rutherford County* v. *Murfreesboro, supra.*

While it is conceded that the decision of the highest court of a state on federal questions are not binding on a federal court, such decisions are entitled to consideration and are persuasive. It is believed that the decision of the Tennessee Supreme Court is more than merely persuasive in this instance in that the Supreme Court of the United States denied certiorari. *Rutherford County* v. *City of Murfreesboro, supra.* Thus, we believe, indicating its approval of the decision.

II. The decision of the court below as to legislative intent is in conflict with clearly expressed congressional intent.

The fourth paragraph of Section 13 of the Tennessee Valley Authority Act as amended in 1940 has been heretofore quoted. The legislative intent is clearly expressed therein as follows:

> " . . . It being the intention of congress that either the municipality or the state in which the municipality is situated shall provide for the proper distribution to the state and county of any portion of tax equivalents so calculated by the municipality in lieu of state or county taxes upon any such distribution system or property." 16 USCA Sec. 831-L.

We believe it to have been unnecessary for the court below to examine the background and legislative history of the 1940 amendment to Section 13 of the TVA

Act of 1933 in view of the express intent of congress contained in the act itself. Legislative intent should thus be determined from the wording of the act, as amended, and the effectuation of legislative intent is a primary concern of any court in construing a statute. *United States* v. *Burleston,* 127 F. Supp. 100.

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law making body which passed it, the sole function of the courts is to enforce it according to its terms (cases cited)." *Caminetti* v. *United States,* 242 US 470, 37 S. Ct. 192; 61 L. Ed. 442.
>
> "All will admit that full effect must be given to the intention of Congress as gathered from the words of the statute." *United States* v. *Bitty,* 208 US 393, 28 S. Ct. 396; 52 L. Ed. 543.

Congressional intent is not only evidenced by the clear wording of the act quoted above, but further in that congress recognized that while it could control TVA it could not control those with whom TVA contracted under the provisions of the act. Therefore congress resorted to an indirect method of control and for all intents and purposes saying (in paragraph 4, section 13 of the 1940 amendment) TVA may elect whether or not to

> "permit or provide for the resale of power at rates which may include an amount to cover tax-equivalent payments to the municipality in lieu of state, county and municipal taxes upon any distribution system or property owned by the municipality, or any agency thereof, conditioned upon a proper distribution by the municipality of any amounts

> collected by it in lieu of state or county taxes upon any such distribution system or property . . . ." 16 USCA Sec. 831-L.

clearly indicating that in the event TVA did provide for in lieu tax payments in its contracts with municipalities then there must be a proper distribution to the county of tax equivalents collected by virtue of such contract.

It is contended that the contract having been executed between the City of Tullahoma and TVA, there then arose a duty on the part of TVA to see that proper distribution of such tax equivalents be made. Black on Interpretation of Laws, p. 341.

The court below sought to compare terminology of the TVA act prior to its 1940 amendment with that subsequent to the 1940 amendment. Prior to the 1940 amendment Section 13 provided that TVA should make payments only to the states of Alabama and Tennessee. This situation was sought to be corrected by a proposed amendment to the act before the senate of the 75th Congress. [Amendment to TVA Act proposed by S. 2925 (1940)] (R. 52)

The lower court found that both as to redistribution of payments made by TVA to the states and the municipal in lieu tax payments, Senate Bill No. 2925 in its original form merely expressed a general intent without imposing specific duties with reference to redistribution. Senate Bill No. 2925 originally provided:

> "The payments above provided shall in each case be made to the state not later than July 31 of each year, and it is the intention of the congress that each state shall redistribute said payments or a portion thereof to counties and other local taxing

districts affected by the program of the corporation.

"It is likewise intended that each of the said states shall in like manner redistribute all payments made in lieu of taxation paid to municipalities by municipal authorities as provided in contracts made for the purchase of power from the corporation." [Amendment to TVA Act proposed by S. 2925 (1940)] (R. 52)

It appears that no specific duties were imposed by that proposed amendment with reference to redistribution. The paragraph dealing with redistribution by the states was eliminated and the paragraph dealing with municipal tax equivalent payments was revised as follows:

"It is intended by congress that each of the said states shall distribute all payments made in lieu of taxation paid to municipalities by municipal authorities as provided in contracts made for the purchase of power from the corporation." 86th Cong. Rec. 5248 (1940).

As pointed out by the lower court, the crucial language of Section 13 involved in this litigation was substituted by an amendment offered from the floor of the senate by Senator Hill of Alabama.

There is some indication on the part of the lower court that upon the amendment being made from the Senate floor on April 30, 1940, which resulted in the final language of the amended act, the matter was dealt with lightly, the court having in its opinion quoted the only discussion which occurred on the Senate floor, as follows:

"Mr. Hill: I understand that this amendment also is agreeable to the senator from Nebraska.

"Mr. Norris: Yes, I see no objection to it, and in fact I think it is a very good amendment." 86th Cong. Rec. 5247 (1940)

It is worthy of note, however, that as early as April 3, 1940 Mr. William C. Fitts, Jr., General Counsel for TVA, had been furnished the proposed amendment to S. 2925 by Mr. Lilienthal, a member of the Board of Directors for TVA, and which contained the exact wording of the final amendment. On April 3, 1940 Mr. Fitts forwarded the following letter:

"April 3, 1940

The Honorable
George W. Norris
United States Senate
Washington, D. C.

My dear Senator Norris

Mr. Lilienthal has handed to me a copy of the amendments to S. 2925 as reported by the Committee on Agriculture and Forestry which have been suggested by Mr. Lapsley through Senator Bankhead. Mr. Lilienthal suggested that I send you whatever comments I might have on these proposed amendments.

I have considered each of the amendments and while I do not believe that any of them are necessary, I see no serious objection. As far as I can see they in no way alter the substance of the bill as reported.

Sincerely and respectfully yours

WILLIAM C. FITTS, JR.
General Counsel

WCF:LR"

It is thus clear that the proposed amendment offered from the floor of the Senate was by no means merely a passing thought but was the perfecting amendment which solved the problem involved, that is, to replace lost taxes to the counties.

It is submitted that the final perfecting amendment cured the problem described by Mr. John D. Lapsley, who was counsel for the State Department of Revenue of Alabama and who was also a representative of the Governor of Alabama and Senator Norris, when Mr. Lapsley appeared to testify before Senator Norris' sub-committee on February 23, 1940. The exchange which occurred between Mr. Lapsley and Senator Norris was as follows:

> "Mr. Lapsley: That is my point, Mr. Chairman. And an additional point on that is that if there are cities in these counties which are collecting a county and state ad valorem tax loss equivalent, that the amount being collected by the city for that purpose in that county should be taken into consideration, and the city should turn over to the state the state and county tax money, or if it pays it to the county, those payments from the city to the county should be deducted from the payments made directly from the TVA to the county. In other words, you have got quite a problem there.
>
> Senator Norris: I know we have. But one of the difficulties that exists right now, as I understand it, and that I think is entirely due to the lack of any state law in any state there, as far as I know—I thought when the original act was passed that the several states would pass laws that would rectify it—for instance, if they paid into a city, City A, let us say, $100,000.00 in lieu of taxes, it was the intention of congress, I take it when it passed the law, or it was the intention of TVA when it made the contract to sell the power

to that municipality, A, that it should be realized in lieu of taxes, and therefore it should be divided up when it was paid for by the city, just as though they would have divided it up if it had been privately owned. Some of it would have gone to the state, some to a school district and some to other subdivisions. But, as I understand it, the city never passed any law requiring that division, and the municipality, naturally, keeps it all.

Mr. Lapsley: Yes, sir.

Senator Norris: And the county does not get any of it.

Mr. Lapsley: Nor the state either.

Senator Norris: Nor the state either. Now, that is one of the difficulties we wanted to rectify and have put in this bill. While we cannot legislate on that, being a state matter, we have gone so far as to state in here that it is the intention of congress, which we did not state originally—it is the intention of congress to do this very thing.

Mr. Lapsley: Well, Mr. Chairman, you state that it is the intention of congress that the state shall do what I had in mind, but you do not express the intention of congress that the cities with whom TVA contracts shall do the same thing.

Senator Norris: Oh, yes; the states could provide by statute that when any municipality receives anything in lieu of taxation, it should be subdivided just the same as though it was taxes—which we cannot say . . . ."

Hearing on S. 2925 before a sub-committee of the Senate Committee on Agriculture and Forestry, 76th Cong., 3rd Sess. 33 (1940)

It is further noted that in the sub-committee hearing of the Senate Committee on Agriculture and Forestry, Senator Norris was led to believe that the municipali-

ties in Tennessee were paying or planned to pay over tax equivalents to the counties in which they were located.

> "Mr. Lapsley: Now, Mr. Chairman, I thought it would be interesting to the committee to know this, because the problem is so different in Alabama than it is in Tennessee, and that is that the money collected by the cities in Alabama is not only not paid to the counties and the State, but the cities have organized to oppose the passage of any such legislation, and whereas in Tennessee certain cities, I understand, have put the money in trust in the bank and are waiting for the passage of enabling legislation and are offering to pay the money to the counties and the State, the Alabama cities make no such proposal and we look on it that as a practical proposition it would be very difficult, if not impossible, to pass any legislation to force the cities to turn any portion of the tax equivalent that they collect over to the States or the counties.
>
> Senator Norris: Now, that is where the controversy arises, and where I cannot help but sympathize somewhat with these people who are advocating that this money should be paid to the counties.
>
> Mr. Lapsley: I do too.
>
> Senator Norris: I would hate to see the State get into a jangle and a fight over the question and hold it up and not pass any law. That would not relieve the situation if that occurred."
>
> Hearing on S. 2925 before the subcommittee of the Senate Committee on Agriculture and Forestry, 76th Cong., 3rd Sess. 34 (1940)

Thus we see that Senator Norris recognized the possibility of a "jangle and a fight" over the question and

for this reason, among others, it is contended that even though some doubt may conceivably have arisen from earlier sections of the act, yet all doubt was removed by the enactment of Paragraph 4, Section 13 of the Act in 1940. It is submitted that doubt arising from language of two provisions of the same statute as to meaning thereof will be resolved in favor of the latter expression. *Skeeles* v. *United States,* 95 F. Supp. 242.

It is further submitted that from the Senate subcommittee hearing on S. 2925 [Hearing on S. 2925 before a sub-committee of the Senate Committee on Agriculture and Forestry, 76th Cong., 3rd Sess. 33, 34 (1940)], Senator Norris recognized the possibility of enabling statutes being passed by one or more of the various states, which enabling statutes possibly would conflict with the intent of Congress, the Tennessee Valley Authority Act and the resulting power contracts entered into between TVA and various municipalities, thus creating greater confusion than had previously existed. This was simply another reason for providing in specific language the clear intent of Congress, i.e., the amended Section 13.

This is further evidenced by the following exchanges which occurred on February 23, 1940 before the above mentioned Senate sub-committee:

From exchange between William C. Fitts, Jr., General Counsel for TVA, and Senator Norris:

> "Mr. Fitts: Yes. Now, you see what is happening is that those retailers who purchase their power at wholesale from the Authority and then retail it to the consumer, those retailers are already collecting the taxes just like the private utilities always collected the taxes from the rates paid. The only problem is for the State to get

back from the retailer its share of those taxes that the retailer is already collecting, and also to distribute to the counties their proportionate share. What is happening in some of the cases where the legislation is not adequate is that the cities are taking it all; the municipal governments are taking that entire tax equivalent payment for themselves, when most of it should be redistributed to the State and the county."

[Hearing on S. 2925 before a Senate sub-committee of the Senate Committee on Agriculture and Forestry, 76th Cong., 3rd Sess. 9 (1940)]

From exchange between Mr. W. D. Hudson, member of the Railroad and Public Utilities Commission of Tennessee and Senator Bankhead from Alabama:

"Mr. Hudson: That is what we want. Of course, Tennessee cannot tax a municipality. The constitution of the State of Tennessee prohibits that. But we can set up a power board with uniform duties of power boards all over the State to carry out these contracts with the Tennessee Valley Authority, which will mean they will have to pay these taxes where they belong. That problem can be solved and will be solved by the State of Tennessee.

What we want primarily is replacement of taxes lost by these counties. I want to just read you a few losses by some of these counties. Take Polk County, a county of approximately 15,000 population, with a bonded indebtedness of a million and a half dollars. That county will lose, as a result of the purchase of the two dams on the Tacoa River—I will give you just exactly what they will lose—that county will lose $106,137.68. If they do not get replacement, they will have to quit.

Senator Bankhead: They cannot quit, can they? A county cannot quit.

Mr. Hudson: They cannot pay off. They have built their budget around this assessment. They have built their bond issue around this assessment. I will admit it is bad for any one county to build its whole budget assessment around one uncertain piece of property for taxation, but there is no way you can help that. That is water over the dam. That has been done. Now, their schools cannot operate. They cannot build their roads and keep them in repair. They will have to quit, and the people who bought these bonds will have to suffer the loss.

Take Marion County, where they bought Hales Bar. I do not think Marion County has an incorporated town in the county. It is a small country county. Marion County will lose $82,137.92. They will have to quit. They cannot exist unless they get a tax replacement to take the place of the taxes they got from the Tennessee Electric Power Co.

Then there is Warren County, White County, Van Buren County. White County is a small county. That is where they bought the Rock Island Dam on Kings Fork River, a tributary to the Cumberland River. They will lose $34,714.91.

[Hearing on S 2925 before a Senate sub-committee of the Senate Committee on Agriculture and Forestry, 76th Cong., 3rd Sess. 24 (1940)]

And a statement of Senator Norris on April 30, 1940 before the United States Senate as follows:

"Mr. Norris: . . . The original bill, without the amendments, provided, as the Senator has stated, that the money which is proposed to be paid in lieu of taxes to any given State should be paid by the T.V.A. to the State itself, and that the State should divide it up as it pleased. It was believed that the State would divide it up the same manner as it would if it were actually tax money. We

must always bear in mind that the money in question is not tax money, because we have to go through the formula at least of refusing to admit that local authorities can tax the property of the Federal Government. I think that is agreed to by everybody.

The several counties in the various States involved have asked for the amendments because the original act provided in section 3 for payments of money in lieu of taxes to two States, Alabama and Tennessee. I think it was the intention of Congress, without any doubt, that when the money was paid to the States—and it has been so paid ever since the T.V.A. Act has been enforced—the States would do just what the Senator from Connecticut has suggested; that by proper legislation they would divide the money up among the counties. But experience has shown that the States did not do it, and therefore various persons and organizations, coming from the counties, and representing the interests of the counties, have appeared before the committee, and have shown what we knew to be true, that the counties heretofore have gotten nothing from the States of Alabama and Tennessee because those States did not, through their legislatures, provide for the division of this money among the counties in which the property was located. The result was that the States got the money, and the counties suffered the loss . . .

That the States should divide up this money was undoubtedly the object of Congress originally, and it is the object in the pending legislation. In fact, it is so stated in the bill, but it can only be stated as the intention of Congress, for it is admitted that Congress cannot say to the States what legislation they shall pass. If Congress expressed, as the original bill provided, its intention that the States should divide up this money, the States would not be legally bound to pay any attention to it. And since they have not done it in the past,

the taxpayers' leagues, and the county organizations, and the State organizations, and county judges, called the attention of the committee to the fact that the States have not done what it was intended they should do, and that the purchase of the properties of the Tennessee Electric Power Co. has resulted in adding to the embarrassment, if I may call it that, heretofore existing in regard to the money the Tennessee Valley Authority should pay in lieu of taxes, by virtue of original section 13, and they said, "Our experience shows that the people who ought to get the money paid in lieu of taxes will not, under this bill, get it."

I am in entire sympathy with their position. I think the States ought to pay the money as suggested. The original bill provided that they should. But when I am confronted with the fact that the States may not do so, and that in the past they have not done so, then I am moved by a desire to assist those counties by the adoption of appropriate amendments. Some of the counties are hard hit under present conditions, and some of them will be in such a dilemma as to make it almost impossible for them to meet their indebtedness, indeed, to meet their ordinary running expenses. That will only occur in very few counties, but it will occur in some.

In order to obviate this difficulty I have favored, as the committee has favored, the proposed amendments, so as to provide that the T.V.A., instead of paying the States, shall pay the counties or the units of the States where taxes are as a rule paid, unless there is some State law to the contrary."

86 Cong. Rec. 5243-5244 (1940)

It is further insisted the language used in the perfecting amendment resulting in the crucial language of Section 13 involved in this litigation, was specific

and that any general language contained therein or creating any inconsistency must be resolved in favor of the specific. *Bradford Novelty Co.* v. *Manheim,* 156 F. Supp. 489.

A similar finding as to congressional intent generally was reached by the District Court in *Tennessee Valley Authority* v. *Polk County,* D. C. Tenn., 68 F. Supp. 692, wherein the court stated:

> "From the provisions of Section 13 itself, from a study of the committee hearings, and a consideration of the remedies sought to be effected by the legislation, I am convinced that, insofar as the counties are concerned, Congress intended to replace to each county taxes lost on the property acquired by the plaintiff in such county. I think a proper construction of Section 13 relative to the rights of the counties will effectuate such intention."

Even assuming the necessity of inquiry by the lower court into the question of background and legislative history, we believe the same result will be reached by this Court and should have been reached by the lower court.

The record does in fact show that TVA prior to the 1940 amendment of Section 13 of the TVA Act had included in its contracts with municipalities provisions for in lieu tax payments and such contracts were basically the same as the contract in the present case. The authority for such contracts prior to 1940 was derived from Section 10 of the Act, as amended in 1935. Under the terms of those contracts tax equivalents were placed into the general funds of the contracting municipality and, as pointed out by the opinion of the lower court, the determination of whether

any portion of the fund should be distributed either to the state or to the county, and if so, the amount, was not recognized as a duty or obligation of TVA, a situation completely different from that existing under the 1940 amendment.

As heretofore expressed, we believe that it is unnecessary to examine the background and legislative history of the statute in question and further in view of of the plain congressional intent expressed in the statute, it may be improper to do so. *United States* v. *Burleston, supra; Caminetti* v. *United States, supra; United States* v. *Bitty, supra.* However, to point out that the fact that the congressional intent is found to be the same, by either route, we have inquired into the intent both as expressed in the statute and as determined by examination of sub-committee hearings and congressional records of Senate proceedings.

It is submitted that the background of the act in question, as determined by reference to the committee hearings, clearly points out the congressional recognition of the problem, the effort to correct the problem and the ultimate correction of the problem by the enactment of the particular statute in question.

III. The lower court placed undue emphasis on administrative interpretation and congressional acquiescence.

It is submitted that the record in this cause at no place presents an interpretation placed by the T.V.A. Board of Directors on the Tennessee Valley Authority Act. The record, in fact, indicates that little more doubt existed in the mind of that Board.

The Court in *Rutherford County* v. *The City of Murfreesboro* stated:

> "In behalf of the City (Murfreesboro) it is further argued that Condition 2(b) of the schedule

quoted supra, is an interpretation by the TVA officials in making this contract with the City of Murfreesboro that is contrary to what we have hereinbefore stated. If so, we think theirs is erroneous. We rather believe, however, that it is a recognition of the responsibility of the municipality to make the distribution as required by the amendment and that the words immediately following the opening words of the sentence are generalizations brought about by some uncertainty in the minds of the officials as to the meaning of the part of the 1940 amendment following the semicolon." *Rutherford County* v. *City of Murfreesboro, supra.*

Congress by its 1940 amendment (16 USCA 831-L) required TVA to submit a "report on the operation of the provisions of this section . . . " (i.e., 16 USCA 831-L), not later than January 1, 1945. Such a report was in fact submitted to Congress by TVA's letter of December 22, 1944. With reference to "Tax and in-lieu payments by local distribution systems", the report stated:

"The power contracts and agreements, through which the TVA exercises its responsibilities for the distribution of electric power, make provision for payments by municipal systems in lieu of state and local property taxes. These in-lieu payments are usually computed by applying the current property tax rates of each jurisdiction to the book value of the electric property within such jurisdictions.

"In the absence of state legislation or special local agreements to the contrary the entire state and local ad valorem property tax equivalent of each system is paid into the general fund of the owning municipality."

The report of TVA further states:

> "Tax as paid by the cooperatives go to the states, counties, and cities in which the property is located. On the other hand, the equivalent of the former state and county taxes on municipally owned systems is commonly paid into the general funds of the municipalities owning the systems, and used for various municipal purposes."

It will be expressly noted that TVA's report does not state to which power contracts and agreements it refers, that is, whether before or after the 1940 amendment to the TVA Act. The report does not state that any "in-lieu" tax payments are or have been calculated by application of county tax rates. The report of TVA does not state to which state or states it has reference. TVA in its report made no recommendation and expressed no approval of the situation it purported to report. Therefore, in view of the vague generalities contained in and surrounding TVA's report, there was absolutely nothing in which Congress could acquiesce.

This accompanied with the fact that the obvious purpose of an Act of Congress (which was so clearly expressed in 16 USCA 831-L) will be sustained by the courts, notwithstanding a contrary construction of an executive department—*Webster* v. *Luther,* 63 U.S. 331, 16 S. Ct. 963, 41 L. Ed. 179; *Alaska S. S. Co.* v. *United States,* 290 U.S. 256, 54 S. Ct. 159, 78 L. Ed. 302; *Stark* v. *Bronson*, 342 U.S. 451, 72 S. Ct. 433, 96 L. Ed.— clearly reveals why Congress did not and could not have acquiesced in a TVA administrative interpretation which never existed. The acquiescence of Congress could hardly be inferred from the mere fact that it had passed no additional legislation to clarify the already clarified TVA Act.

IV. The determination of the lower court violates grammatical interpretation of the statute involved.

Turning to the actual language used in effectuating its declared intent, it is found that Congress permitted the sale of electric power at rates high enough to permit payment of tax equivalents to municipalities by specific sanction. However, this permission or authority was defined and limited in positive terms. It will be observed that in the troublesome statute involved, 16 USCA 831-L, the phraseology is:

> "to permit or provide for the resale of power at rates which *may* include an amount to cover tax equivalent payments to the municipality in lieu of . . . *county* . . . *taxes* upon any distribution system or property owned by the municipality or agency thereof, *conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of . . . county taxes upon any such distribution system or property.*"

It is evident that the phrase beginning "conditioned upon a proper distribution by the municipality . . . " relates to and qualifies that which precedes; and since it is set off from that which precedes it by a comma it is equally evident that it qualifies the entire preceding portion of the same sentence rather than a single noun or pronoun in the sentence. The very word "conditioned" denotes a restriction of the authority granted TVA by Congress to certain prescribed limits. The prescribing of limitations on the authority of TVA to make certain types of contracts is well within the province of legislative prerogative, and therefore if certain types of contracts are entered into by TVA, i.e., including provisions for collection of tax equivalents, they must be entered into subject to the conditions imposed by Congress, i.e., "conditioned upon a proper

distribution by the municipality of any amounts collected by it in lieu of . . . county taxes upon any such distribution system or property."

V. The court below has decided an important question of federal law which has not been, but should be, settled by this Court.

For the year 1959 the Utilities Board for the City of Tullahoma paid into the general fund of the City an aggregate sum of $27,892.76 under Section 10(c)(2) of the contract between the City and TVA. Said section of the contract contains provisions for application of the county tax rate on the value of the power system. The County in the year 1959 made demand of the City for said sum.

The entitlement of said funds here in question depends on the construction of the contract between the City and TVA, which contract in turn derives its efficacy from the Tennessee Valley Authority Act, as amended, 16 USCA Chap. 12-A, and the contract is circumscribed by all the pertinent provisions of said statute. *Armour Packing Co.* v. *United States,* 209 U.S. 56, 28 S. Ct. 428, 52 L. Ed. 491.

The statute here in question relates to the subject matter of the contract between the city and TVA and must, it is submitted, be read into said contract, there being no contrary intent appearing. *Armour Packing Co.* v. *United States, supra; Connecticut Mutual Life Ins. Co.* v. *Creshman,* 108 U.S. 51, 2 S. Ct. 236, 27 L. Ed. 648.

The court's attention is here called to the far reaching effect of its decision in the event it shall fail to consider this cause on writ of certiorari. TVA has entered into contracts similar to that in this cause with

some 98 cities other than the City of Tullahoma and located in the states of Tennessee, Kentucky, Alabama, Mississippi, North Carolina and Virginia. It is believed that to deny certiorari in this cause would be to create a great multiplicity of actions in both the state and federal courts of the above named states, especially in view of the above mentioned contrary decision of the court of highest resort in Tennessee--*Rutherford County* v. *Murfreesboro, supra.*

The decision of this court on writ of certiorari will finally and completely settle and determine the controversy which has been created by the contract for the purchase of wholesale electrical power between various municipalities and the TVA.

CONCLUSION

There are gross inequities in the decision of the lower court. That decision permits a municipality contracting with TVA under the provisions of 16 USCA 831-L to include in its rates, which it charges to users of electricity, sums in lieu of county taxes when in reality they are for no such purpose but are used by the municipality for its own purposes. Such constitutes a gross misapplication of the formula prescribed by Congress and set down in 16 USCA 831-L as well as to do violence to the basic purpose for the enactment of that statute.

It is submitted that upon execution of the contract between the City and TVA which contained provisions for collection of in-lieu tax equivalents, the City in no uncertain terms guaranteed that it would make proper distribution of those funds to the county, and the TVA by so doing was obligated to determine that such distribution would be made by the City to the County.

It is our contention that the rights of the county are clear under the statute involved and the executed contract. That the court has no power to make a new contract between TVA and the City. *American Fidel. & Cas. Co.* v. *St. Paul Mercury Indemnity Co.*, 248 F. (2d) 509. But that the court can and will read into the contract involved what the law had previously put there. This court should grant the writ of certiorari and clear the confusion which does now exist and which will otherwise continue to exist.

Respectfully submitted.

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APPENDIX A

(Filed Febuary 22, 1964)

No. 15078

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CITY OF TULLAHOMA, *Plaintiff-Appellant*,

v.

COFFEE COUNTY, TENNESSEE, *Defendant-Appellee*.

Appeal from the United States District Court for the Eastern District of Tennessee, Winchester Division

Decided February 22, 1964

Before: CECIL and WEICK, Circuit Judges, and WILLIAM E. MILLER, District Judge.

WILLIAM E. MILLER, District Judge. Plaintiff-appellant, City of Tullahoma, Tennessee, apeals from a declaratory judgment in favor of defendant-appellee, Coffee County, Tennessee. The District Court held (1) that under the Tennessee Valley Authority Act of 1933, as amended, the City, which operates its own electric distribution system and purchases its electric power from the Tennessee Valley Authority, is obligated to pay to the County certain tax equivalents which are taken from revenues of the City's electric department and placed in its general funds, and (2) that under the Act the Tennessee Valley Authority is required to include in its contracts with cities provisions implementing such statutory obligation.

The Tennessee Valley Authority is authorized by Section 10 of the Act (16 U. S. C. Sec. 831 i) to sell its surplus power to states, counties, municipalities, corporations, partnerships and individuals, and to include in any contract for the sale of power ". . . such terms and conditions, including resale rate schedules, and to provide for

such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Chapter. . . ."

The City obtains its electric power supply from TVA under a contract executed July 1, 1947. Section 6 of the contract provides that gross revenues from electric operations shall be first applied and used for certain purposes in a specified order of priority and that from the remaining revenues the City ". . . may thereafter pay into its General Fund a tax equivalent as provided . . . in the Schedule of Terms and Conditions attached hereto." Section 10 of the contract provides:

> "It is hereby recognized and declared that, pursuant to the obligations imposed by the Tennessee Valley Authority Act of 1933 as amended, Municipality's operation of a municipal electric distribution system and Authority's wholesale service thereto are undertaken primarily for the benefit of ratepayers and that Municipality shall receive from the operation thereof for the benefit of its General Fund, to be used for any permissible municipal purpose, only (a) a return on any investment made from general funds in the electric system, and (b) an amount in lieu of taxes, representing a fair share of the cost of government properly to be borne by such system. . . ."

Section 10(c) of the "Schedule of Terms and Conditions" which is made a part of the contract provides:

> "Municipality may take from the electric department revenues or funds for the general funds of Municipality an amount in lieu of taxes (representing a fair share of the cost of government properly to be borne by its electric distribution system) to be determined subject to the terms and conditions hereafter stated.

"(1) To the extent surplus revenues are available, . . . Municipality may take from the electric department revenues or funds for the general funds of Municipality an amount calculated by applying the prevailing municipal property tax rate to the value of the property used in the electric operations within the municipal limits.

"(2) To the extent surplus revenues are available, . . . Municipality may take from the electric department revenues or funds for the general funds of Municipality an amount calculated by applying the prevailing county and State tax rates to the value of the electric system; . . . ."

Pursuant to the terms and provisions of the contract, the City takes from the electric system revenues for its general fund and an amount calculated by applying the prevailing municipal and county property tax rates to the depreciated original cost of properties used in its electric operations. Sometime prior to the institution of this action, the County made demand upon the City for the sum of $27,892.76 taken from revenues of the electric system for the calendar year 1959 and placed in the City's general fund, an amount calculated by applying the county property tax rate to the depreciated cost of tangible property used in electric operations. The County based its demand upon the fourth paragraph of Section 13 of the Act, as amended in 1940 (16 U. S. C., Section 831 *l*). The first three paragraphs of that Section authorize and direct TVA to make certain payments in lieu of taxation to states and counties in which it has acquired properties previously subject to state and local taxation. The fourth paragraph, the interpretation of which is determinative of the present controversy, provides:

"Nothing herein shall be construed to limit the authority of the Corporation in its contracts for the sale

of power to municipalities, to permit or provide for the resale of power at rates which may include an amount to cover tax-equivalent payments to the municipality in lieu of State, county and municipal taxes upon any distribution system or property owned by the municipality, or any agency thereof, conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes upon any such distribution system or property; it being the intention of Congress that either the municipality or the State in which the municipality is situated shall provide for the proper distribution to the State and county of any portion of tax equivalent so collected by the municipality in lieu of State or county taxes upon any such distribution system or property."

The City rejected the demand and instituted the present litigation for a declaratory judgment construing the Act and declaring the rights of the parties. The District Court concluded that the Congressional intent was:

"First: that all local governments involved, including the defendant County, should share in this third type of T. V. A. tax equivalent payments. Cf. *Rutherford County* v. *City of Murfreesboro,* 205 Tenn. 362, 326 S.W. (2d) 653;

"Second: that either the municipalities or the states of their situs should provide for the proper distribution of the respective local governments' share of the equivalent payments of the third type collected by the municipalities. 16 U. S. C. 831 *l;* and

"Third: that (a) where neither the state legislature nor the affected municipality made provision for a proper distribution of such funds, and (b) contracts for the sale of electric power to municipalities at rates including an amount to cover local tax equivalent payments to such municipalities in lieu of local

taxes upon the municipalities' electric systems are entered into between the Tennessee Valley Authority and such municipal corporations, then (c) such contracts must provide a proper distribution by the municipalities of such amounts so collected by the cities."

In its Final Decree, the Court adjudged "that Coffee Couty has a right of action against the City of Tullahoma for the sum of $27,892.76 for the year 1959 on account of electric power tax equivalents paid into the City's general fund and not distributed to the County." In its memorandum opinion the Court stated that it had before it no fomula from which to determine whether this amount is the "proper" distribution; that it could not conclude that either the General Assembly of Tennessee or the Tullahoma City Council would have considered that amount the "proper" distribution; and that in this situation resort would be made "to the only formula available to the Court, i.e., the one agreed to by the plaintiff City and the TVA in Section 10(c)(2) of the Schedule of Terms and Conditions of their contract, supra. The gist of this formula is that the tax equivalent involved shall be '. . . . an amount calculated by applying the prevailing county . . . tax rate . . . to the value of the electric system; . . . .'"

At the outset it must be conceded, we believe, that the meaning to be ascribed to the provision of Section 13 here involved is not free from doubt and that its language is ambiguous. On the basis of the text alone there would appear to be at least four views which might reasonably be taken as its meaning. One rendition is that while TVA is not required to include a contractual provision for tax equivalent payments and is not required in any event to determine the "proper" distributin of such payments by the municipality to the County, it nevertheless is obligated to refuse to "permit or provide" for tax equivalent payments unless provision has first been made for such distribution either by the State or by the municipality. Under

this interpretation the distribution would be left entirely to the State or to the municipality in conformity with the expressed intention of Congress that the municipality or State shall provide for the "proper" distribution of amounts collected by the municipality in lieu of State or County taxes. At the same time effect would be given to the words of the statue, "conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of state or county taxes. . . ."

Another possible interpretation is that TVA has no obligation when entering into a contract with a municipality in permitting or providing for tax equivalent payments to determine that a proper method of distribution has been provided for either by the State or the municipality, and that its obligation is fully satisfied simply by including a provision in the contract that either the State or the municipality shall provide for such proper distribution, leaving the performance of this obligation entirely to the state legislature or to the municipality. Such an interpretation also would appear to give effect to the pertinent words of Section 13.

A third interpretation is the one adopted by the District Court:

> "It is clear to the Court that the Congress placed a mandatory duty on T. V. A. to write a tax equivalent distribution provision into all contracts with municipalities of the nature under construction here unless the State in which the respective municipalities are situated has '. . . provided for the proper distribution to the State and county of any portion of tax equivalent so collected by the municipality . . .,' or unless the municipality had previously and otherwise done so. As neither the State of Tennessee, contrary to its neighboring Commonwealth of Kentucky, nor the plaintiff City has made such provision, it was incumbent upon the Tennessee Valley Authority to include

such a provision in its contract with the plaintiff City. The Tennessee Valley Authority did not do this. Its corporate 'person' ignored the plain provisions of the law under its erroneous interpretation of that law. *Rutherford County* v. *City of Murfreesboro,* supra, 326 S.W. (2d) 653, 656."

A fourth view of the statute (perhaps only slightly different from the second) is that Congres simply expressed a general intention that there should be a proper distribution of tax equivalent payments made to the states and counties, but did not undertake to implement such intention by imposing duties to that effect either upon TVA, the states, or upon municipalities, leaving this matter exclusively to local control or regulation. Under this view TVA would have no duty with reference to the proper distribution of tax equivalent payments but such distribution would be determined exclusively by the state or by the municipality itself. In the absence of such provision for distribution, the municipality would be entitled to retain the entire fund representing tax equivalent payments and no action would lie on the part of the County to recover any part of such payments.

It seems entirely clear, therefore, in view of the diverse and varied meanings and interpretations which may be ascribed to the statutory language that resort must be had to other aids in determining the Congressional intent. In light of the background of the provision, its legislative history, and contemporaneous and long continued administrative interpretation, coupled with the apparent acquiescence by Congress in such interpretation, we are persuaded that Section 13 must be construed in conformity with the fourth view set out above.

BACKGROUND AND LEGISLATIVE HISTORY

Legislative history is an accepted aid in the interpretation of a federal statute and frequently is determinative of its meaning. *Harrison* v. *Northern Trust Co.*, 317 U.S. 476. The record shows that TVA, before the 1940 Amendment of Section 13 of the TVA Act, had included in its contracts with municipalities provisions for in-lieu tax payments, such contracts basically being the same as the contract with the City in the present case. Authority for including such provisions was derived from Section 10, as amended in 1935, authorizing TVA to sell its surplus power to states, counties and municipalities, and "to include in any contract for the sale of power . . . such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of the Act." Such contracts provided for the sale of electric power by TVA to municipalities at wholesale rates. One of TVA's chief concerns in accordance with the underlying philosophy of the Act was with the ultimate rates to the consumers. The determination of such rates was not left to the uncontrolled discretion of the municipalities. Provisions were inserted in its contracts which not only limited the price at which power supplied by TVA could be sold to the consumers, but also limited the use which the City could make of its electric revenues the permitted uses including operating costs, interest on system indebtedness, reasonable reserves and working capital, and "tax equivalent payments into Municipality's general fund." It is clear from the record that in the TVA contracts entered into prior to the 1940 Amendment of Section 13 and resting entirely upon the authority of Section 10 as amended in 1935 (which section has never been subsequently amended), the distribution of tax equivalent payments was neither dictated, controlled, nor even provided for by TVA, being treated altogether as a matter for state or local determination. Under the terms of the contracts the tax equivalents

were permitted to be placed in the City's general fund, but the determination of whether any portion of the fund should be distributed either to the State or to the County, and if so, the amount of such distribution, was not recognized as the duty or obligation of TVA but that of the state or municipality concerned.

As originally enacted in 1933, Section 13 of the TVA Act provided only for in-lieu tax payments by TVA to the states of Alabama and Tennessee. The original version of the 1940 Amendment to Section 13 as introduced in the 75th Congress (S. 2925), provided that TVA should make payments only to the states, leaving to the states the function of distribution among counties and other subdivisions. The bill contained the following two paragraphs:

> "The payments above provided shall in each case be made to the State not later than July 31 of each year, and it is the intention of the Congress that each State shall redistribute said payments or a portion thereof to counties and other local taxing districts affected by the program of the Corporation.
>
> "It is likewise intended that each of the said States shall in like manner redistribute all payments made in lieu of taxation paid to municipalities by municipal authorities as provided in contracts made for the purchase of power from the Corporation [50a Amendment to TVA Act Proposed by S. 2925]."

It seems clear that both as to redistribution of payments made by TVA to the states and the municipal in-lieu tax payments, the bill in this form merely expressed a general intent without imposing specific duties with reference to redistribution. As reported to the Senate the bill provided that a portion of the payments should be made directly by TVA to the counties in accordance with a formula set forth in the bill itself. This necessarily required elimination of

the above paragraph dealing with such redistribution of payments by the states, and minor revisions of the paragraph dealing with municipal tax equivalent payments. The second paragraph dealing with distribution of payments in the latter category was revised to read:

> "It is ~~likewise~~ intended by Congress that each of the said States shall in ~~like manner redistribute~~ distribute all payments made in lieu of taxation paid to municipalities by municipal authorities as provided in contracts made for the purchase of power from the Corporation [86 Cong. Rec. 5247 (1940)]."[1]

The crucial language of Section 13 involved in this litigation was substituted for the above by an amendment offered on the floor of the Sentae by Senator Hill of Alabama. When so offered the only discussoin which occurred was as follows:

> "Mr. Hill: I understand that this amendment also is agreeable to the Senator from Nebraska.
>
> "Mr. Norris: Yes, I see no objection to it, and in fact I think it is a very good amendment. [86 Cong. Rec. 5247 (1940)]."

Further legislative history is correctly set forth in the amicus curiae brief of TVA as follows:

> "Appellee, in its brief at pages 23-24, notes that the amendment was offered by Mr. Hill on behalf of the other Alabama Senator Mr. Bankhead, and that it was one of 'two or three minor perfecting amendments' suggested by Mr. John W. Lapsley, who was counsel for the State Revenue Department of Alabama and had appeared both in that capacity and as personal

[1] Changes are indicated by underscoring words added and by marking through words deleted.

representative of the Governor of Alabama in testifying during the committee hearings on S. 2925 [86 Cong. Rec. 5245 (1940)]. Appellee quotes excerpts from the committee hearings, apparently for the purpose of showing that Senator Norris agreed, in a colloquy with Mr. Lapsley during the hearings, that Congress should include in the legislation a requirement—rather than an expressoin of hope—that a portion of in-lieu tax payments by municipalities should be redistributed to counties, and that this must have been the purpose of the amendment offered by Senator Hill.

"In so doing, however, appellee omits what seems to us the crucial portion of the colloquy. At the middle of page 22 of appellee's brief, there appears the following quotation of a remark made as a part of the colloquy by Senator Norris:

"Senator Norris. Nor the state either. Now, that is one of the difficulties we wanted to rectify and have put in this bill.

"This is followed in appellee's brief by a line of dots indicating omissions, and then by a later portion of the colloquy. Reference to the hearings indicates that Senator Norris' complete remarks and the pertinent part of the immediately following portion of the colloquy omitted from appellee's brief, were as follows:

"Senator Norris. Nor the State either. Now, that is one of the difficulties we wanted to rectify and have put in this bill. While we cannot legislate on that, being a State matter, we have gone so far as to state in here that it is the intention of Congress, which we did not state originally—it is the intention of Congress to do that very thing.

"Mr. Lapsley. Well, Mr. Chairman, you state that it is the intention of Congress that the State shall do

what I had in mind, but you do not express the intention of Congress that the cities with whom T.V.A. contracts shall do the same thing.

"Senator Norris. Oh, yes; the States could provide by statute that when any municipality received anything in lieu of taxation, it should be subdivided just the same as though it was taxes—which we cannot say [Hearing on S. 2925 Before a Subcommittee of the Senate Committee on Agriculture and Forestry, 76th Cong., 3d Sess. 33 (1940)]."

It thus would appear that the sponsors of the amendment had no thought or intention that Congress itself was directly legislating to impose mandatorily on TVA, or upon the states or municipalities, the duty or obligation to provide for distribution of municipal in-lieu tax payments to the counties. As Senator Norris clearly stated, it was his view that Congress could not so legislate and that this was a matter of local or state control. If the amendment presented on the Senate floor, which was finally enacted, had been intended to have a different and more far-reaching effect to the extent that Congress itself should directly legislate to impose duties in this respect, it seems obvious that Senator Norris would not have stated that "it is a very good amendment," and Senator Hill would not have described it as a "minor perfecting" amendment.[2]

Also, if such had been the intent, it is difficult to understand why the sponsors of the amendment would have been willing to use such vague and indefinite terminology, espe-

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[2] "S. 2925, as amended in committee and on the Senate floor, was passed by the Senate and, though not passed as such by the House, was enacted into law as a rider attached by the Senate to the Emergency Relief Appropriations Act [54 Stat. 626-27 (1940)]" TVA Brief, Amicus Curiae, P. 13. Committee on Military Affairs had voted to table H.R. 7424, the House counterpart of S. 2925, and it was never considered on the floor of the House.

cially since they had already provided in amending Section 13 a specific statutory formula for direct payment to states and counties of tax equivalents on properties owned by TVA. The conclusion appears clearly warranted that Congress considered that it had unquestioned authority to legislate directly as to the distribution of such payments made out of TVA funds and with respect to properties owned by TVA, but that it either could not or should not undertake to do so as to funds and properties owned by political subdivisions of the states.

The provision of Section 13 now under consideration, when viewed in the light of its background and history, and also in the light of the broad authority already conferred upon TVA under Section 10, was, in our view, intended primarily to make clear that the amendment of Section 13 as to payments of tax equivalents by TVA to states and counties should not be construed to impair or interfere with TVA's existing authority under Section 10 to permit or provide for such tax equivalent payments by municipalities. This view of its purpose finds support in the language of the provision itself. It is to be observed that it is not couched in terms as a grant of power or authority, nor is it written or composed in such way as to impose a duty or obligation. A purpose to preserve and continue intact the authority of TVA under Section 10 follows from the opening words of the provision that "nothing herein shall be construed to limit the authority of the Corporation in its contracts for the sale of power to municipalities, to permit or provide for the resale of power at rates" which may include tax equivalent payments in lieu of state, county and municipal taxes. As already stated, in exercising its authority under Section 10, it had been the uniform practice of TVA in contracting with municipalities to leave the matter of distribution of tax equivalents entirely to the states or municipalities concerned. If Congress had intended to change or alter such settled practice so as to control by Congressional fiat the matter of distribution of

municipal tax equivalents, it is only reasonable to suppose that it would have amended Section 10 accordingly, or at least that it would have expressed its intention in direct and unmistakable terms.

ADMINISTRATIVE INTERPRETATION

Of considerable weight and importance in determining the meaning of a statute is the interpretation given to it by those who are charged with its administration. *County of Marin* v. *United States,* 356 U. S. 419; *Billings* v. *Truesdell,* 321 U. S. 542; *United States* v. *American Trucking Association,* 310 U. S. 534. There can be no doubt from the record that since the 1940 Amendment of Section 13, TVA has uniformly construed and interpreted it as making no change in the practice which had been followed by TVA prior to 1940 in contracting with municipalities as to municipal tax equivalent payments. Its view has always been, both before and after the 1940 Amendment, that the question as to whether the municipalities should make a distribution of tax equivalents to the counties, and if so, the formula to be used for making such distribution, were strictly matters of state or local control over which TVA had not authority. In its brief the City refers to the following established facts to support its view as to the administrative and contemporaneous interpretation of the 1940 Amendment:

TVA in its negotiations with cities concerning power contracts has advised such cities that they might retain all tax equivalents if they so desired. Some of the cities which entered into contracts for TVA power previously operated their own distribution systems, and in no case did these cities share their tax equivalents with counties. Generally, these cities, taking all tax equivalents possible under the TVA contract, including the so-called county tax equivalents, would receive less than they received prior to such contract. In Alabama and Mississippi, of 31 municipal

distributors, not one shares its tax equivalents with the county. The state of Kentucky has a statute which requires its cities to share their tax equivalents with counties. In Tennessee, of the 57 municipal distributors, only 12 make a distribution to counties, some of them acting under special legislation which requires it. Only one of such distributors is known to make a payment to the county without special legislation. In all of its many power contracts with cities, TVA permits the city to take the total tax equivalents and place them in the city's general fund without sharing the same with the country, with the sole exception of Kentucky which has a state statute on the subject, as above noted.

ACQUIESCENCE BY CONGRESS

The last paragraph of the 1940 Amendment to Section 13 directly TVA, not later than January 1, 1945, to submit to Congress a report "on the operations of the provisions of this section. . . ." The TVA Board, pursuant to this direction, transmitted its report to Congress by letter of December 22, 1944, such report dealing with the background and operation of Section 13 as re-written in 1940. With reference to "Tax and In-Lieu Payments by Local Distribution System," the report stated:

> "The power contracts and agreements, through which the TVA exercises its responsibilities for the distribution of electric power, make provision for payments by municipal systems in lieu of state and local property taxes. These in-lieu payments are usually computed by applying the current property tax rates of each jurisdiction to the book value of the electric property within such jurisdictions.
>
> "In the absence of state legislation or special local agreements to the contrary the entire state and local ad valorem property tax equivalent of each system is paid into the general fund of the owning municipality."

The report further said:

> "Taxes paid by the cooperatives go to the states, counties, and cities in which the property is located. On the other hand, the equivalent of the former state and county taxes on municipally owned systems is commonly paid into the general funds of the municipalities owning the systems, and used for various municipal purposes."

In addition, the TVA Board, acting pursuant to an express requirement of Section 14 of the TVA Act, as amended (16 U. S. C., Sec. 831 m), filed annual reports with Congress. That section of the Act requires the TVA Board to file with each annual report copies of all power contracts entered into by TVA during the year. All of these annual reports since 1940, with the exception of the fiscal years, 1942, 1952 and 1953, have contained copies of one or more power contracts with municipalities, such contracts including provisions showing the TVA Board's construction of the relevant portion of Section 13.

As pointed out in TVA's brief, although the TVA Act has been amended no less than seven times since 1940, and although Congress has been advised, both in a special report and in successive annual reports, of the TVA Board's construction of the 1940 Amendment, it has taken no action to annul or overturn, or in any way to modify such construction. In view of the information supplied by the TVA Board as to how the 1940 Amendment was being construed and applied, the failure of Congress to act, particularly over such a long period, is an important if not controlling factor in support of the construction of the amendment adopted and followed by TVA and its governing board.

The Supreme Court in *Costanzo* v. *Tillinghast*, 287 U. S. 341, dealt with the failure of Congress to act to change a

long-continued administrative construction, and a rule was laid down which we think has direct application here:

> "The administrative interpretation, as evidenced by the applicable Rules of the Bureau of Immigration adopted in 1917 and carried forward in later regulations, has been uniform to the effect that no time limitation is applicable in a case like the present. The failure of Congress to alter or amend the section, notwithstanding this consistent construction by the department charged with its enforcement creates a presumption in favor of the administrative interpretation, to which we should give great weight, even if we doubted the correctness of the ruling of the Department of Labor" [p. 345].

Mention should be made of the contrary decision of the Supreme Court of Tennessee in *Rutherford County* v. *City of Murfreesboro*, 205 Tenn. 362, cert. den. 361 U. S. 919. In that case the Court stated that the determinative question was the proper construction of the 1940 Amendment to Section 13 of the TVA Act, the contract involved being substantially identical to the contract before us and having been entered into subsequent to the 1940 Amendment. The Court interpreted the Amendment in accordance with the County's contention in the present case and contrary to the interpretation of the TVA and of the City, holding that while TVA under the Amendment has discretion either to include or to omit a provision for tax equivalent payments, if such provision is included, it must be conditioned upon a proper distribution by the municipality of any such amounts collected in lieu of state and county taxes. It was further held that the Amendment required the municipality to distribute tax equivalents to states and counties fairly and as replacement of lost taxes. It is to be observed that the case was disposed by overruling a demurrer filed by the City of Murfreesboro to the bill of complaint of Rutherford County in which a construction of the Amend-

ment was sought. From the opinion it is clear that the Supreme Court did not have before it the facts, so clearly developed in the present case, showing the consistent administrative interpretation of the Amendment by TVA, and the special and annual reports as to the operation of the Amendment made by the TVA Board directly to Congress. Also, an examination of the opinion discloses that the Court did not refer to the legislative history of the Amendment, history which we deem to be of special significance in this case in view of the ambiguity of the statutory provision involved. While the decisions of the highest court of a state on federal questions (admittedly not binding on a federal court) are entitled to consideration and are many times persuasive, for the reasons stated, we feel that the result reached in this instance by the Supreme Court of Tennessee should not be followed.[3] It is true that the Supreme Court of the United States refused to review the decision by denying certiorari. However, such denial may, as suggested by the City, be accounted for by the fact that the decision was not final, requiring a remand to the trial court for further proceedings to determine the amount of the County's recovery. In any event, such denial of certiorari implies no opinion or decision by the Supreme Court on the merits of the case.

For the reasons stated herein the judgment of the District Court is reversed and the action is remanded to that Court for entry of judgment in accordance with this opinion.

WEICK, Circuit Judge, dissenting. With all due respect, I do not believe that Congress ever intended the result

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[3] The Supreme Court of Tennessee had previously held in Rutherford County v. City of Murfreesboro, 202 Tenn. 445, in a case involving a TVA contract entered into prior to the 1940 Amendment of Section 13, that a city distributing TVA power to consumers was not required either by the state law or the TVA contract to share with the county tax equivalent payments which the city took into its general fund.

reached here. As I read the 1940 amendment to Section 13, no obligation was imposed upon TVA to provide for tax equivalent payments in its contracts with municipalities, but if such payments are provided they must be "conditioned upon a proper distribution by the municipality of any amounts colected by it in lieu of state or county taxes upon any such distribution system or property . . ."

The majority's holding in this case permits a municipality to include in the rates, which it charges to users of electricity, sums in lieu of county taxes when in reality they are for no such purpose, but are used by the municipality for its own purposes. In my judgment, this constitutes not only a misrepresentation to the consuming public if the sums were not intended to be used for the purpose for which they were charged and collected, but also a conversion of funds which in equity and good conscience belong to the county. To allow such a windfall to the municipality does violence to the manifest purpose of tax equivalent payments. State and county governments are just as much entitled to receive their distributive share of tax equivalents as municipalities.

When Congress authorized the TVA to acquire property previously subject to state, county and local taxation, a specific formula was enacted in Section 13 to provide recompense for the loss of taxes to the states and local governments. Cf. *T.V.A.* v. *Polk County*, 68 F. Supp. 692, aff'd 158 F.2d 96 (CA 6). The in-lieu-of-tax payments were so formalized that the Act even directed that payments be in equal monthly installments.

We are here concerned, not with property acquired by TVA, but with distribution facilities and systems owned by a municipality. The TVA was empowered by the statute to make contracts which provide for "tax equivalent payments t othe municipality in lieu of state, county and municipal taxes upon any distribution system or property owned by the municipality . . ."

As stated in the 1941 Annual Report of TVA at page 24: "It remains for the municipalities or the state legislatures to devise formulas for distributing a portion of these funds back to the counties and the states." The municipality was obligated to devise the formula in negotiations with the county and state. One guideline, which may be considered in the negotiations, would be the prevailing county and state tax rates on the value of the electric system. The formula used by one municipality might not be identical with that of another, but this does not preclude devising it. In my opinion, that Act, as a condition subsequent to the tax equivalent payments to the municipality, mandates a distribution to the county and state of their respective tax equivalents initially collected by the municipality.

The requirement of distribution is not contrary to other provisions of the Power Contract between TVA and appellant. Clause 6 enumerates the priority of the disposition of revenues from the municipality's electric operations.[1] Tax equivalent payments are placed fifth.

---

[1] 6. Disposition of Revenues: Municipality agrees to dispose of its gross revenues from electric operations in the following manner:

(a) Revenues shall first be used for the payment of all current operating expenses, including salaries, wages, cost of materials and supplies, power at wholesale, and insurance.

(b) From remaining revenues Municipality shall next currently provide for the payment at maturity of interest accrued on all System Indebtedness, and for amortization charges and/or sinking fund payments thereon.

(c) Thereafter, revenues shall be used currently to set up reasonable reserves for replacements, new construction, and contingencies, and to provide a reasonable amount of cash working capital.

(d) From remaining revenues Municipality may thereafter pay into its General Fund a return on its investment, as provided in the Financial and Accounting Policy in the Schedule of Terms and Conditions attached hereto.

(e) From remaining revenues Municipality may thereafter pay into its General Fund a tax equivalent as provided in the Financial and Accounting Policy in the Schedule of Terms and Conditions attached hereto.

The Schedule of Terms and Conditions in the contract provided the manner in which the tax equivalents should be taken from the electric system's revenues and placed in the municipality's general fund. Paragraph 10(c) (2) allows the municipality to receive and distribute an amount "calculated by applying the prevailing county and state tax rates to the value of the electric system." The municipality is specifically prohibited however from distributing to the county and state in-lieu-of-tax payments that "would exceed the amount derived by applying the prevailing county and state tax rates to the value of the electric system." (Paragraph 10(c)(2))

The distribution of tax equivalents is not absolute, but conditional. Unlike the statutory payments by TVA in the initial part of Section 13, the tax equivalents by the municipality to the county or state are subject to numerous contingencies. For example, tax equivalents could not be withdrawn if the electric system operated with a deficit or failed to satisfy the prior obligations of Clause 6(a)-(d), supra.

Allowing the municipality to withdraw and retain an amount covering tax equivalents in lieu of the state and county taxes without a distribution thereof was, in my opinion, neither intended nor sanctioned by Section 13. When the parties contracted and thereby incorporated all provisions of the TVA Act, as amended,[2] the municipality accepted the benefits, as well as the responsibilities, one of which was to fashion a distribution formula of tax equivalents to the county and state.

I think a formula was devised by the City of Tullahoma when it included in its rates the sums in lieu of Coffee

[2] The contract, in part, provided: "Now, therefore, for and in consideration of the mutual covenants herein contained and subject to all of the provisions of the Tennessee Valley Authority Act of 1933 as amended, the parties hereto mutually covenant and agree as follows. . . ."

County taxes. True, it did not negotiate this formula with the county, but it is clear that the county acquiesced therein by demanding the sums to which it was entitled thereunder. Upon the collection of these sums, it became the duty of the municipality to distribute them to Coffee County.

In my judgment, the Supreme Court of Tennessee correctly interpreted the statute in *Rutherford County* v. *City of Murfreesboro*, 205 Tenn. 326, cert. denied 361 U. S. 919. While the denial of certiorari by the Supreme Court does not constitute an affirmance or even approval of the judgment, I feel certain that the Supreme Court would have acted in the case if it believed that the TVA statute, 16 U. S. C. § 831 L, had been grossly misapplied by the state court.

I would affirm the judgment of the District Court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
WINCHESTER DIVISION

Civil Action No: 510

CITY OF TULLAHOMA

-VS-

COFFEE COUNTY, TENNESSEE

Order

This cause came on for further hearing upon the mandate of the United States Court of Appeals for the Sixth Circuit received and entered on March , 1964, and in accordance therewith,

IT IS ORDERED, ADJUDGED and DECREED, as follows:

1) The Decree of this Court entered on May 7th, 1962 is vacated and set aside;

2) The Tennessee Valley Authority Act, as amended, (16 U.S.C.A. Section 831 L), expressed the general intention of Congress that there should be a proper distribution of tax equivalent payments made to the states and counties, but did not undertake to implement such intention by imposing duties to that effect upon Tennessee Valley Authority or the states, leaving this matter exclusively to local control or regulation.

3) Under said Statute, Tennessee Valley Authority has no duty with reference to the proper distribution of the tax equivalent payments but such distribution is to be determined exclusively by the state or by the municipality itself.

4) In the absence of provision by the state, or by the municipality itself, for distribution of tax equivalents, the municipality is entitled to retain the entire fund represent-

ing tax equivalent payments paid by a municipal electric distribution system into the general fund of the municipality and no action will lie on the part of the county in which the municipality is situated to recover any part of such payments.

IT IS FURTHER ORDERED that Defendant shall pay the costs, including the costs on appeal as certified to this Court, by the Clerk of the United States Court of Appeals for the Sixth Circuit, for which execution may issue, if necessary.

Entered this 14 day of May, 1964.

s/ C. G. NEESE
District Judge

APPROVED FOR ENTRY:

s/ DAVID W. SHIELDS, III
s/ GERALD L. EWELL
Attorneys for Defendant

s/ EDWIN F. HUNT
s/ CHAS. F. HICKERSON
Attorneys for Plaintiff

APPENDIX C

Statute Involved—Portion of 16 U.S.C.A., Sect. 831-L

"Nothing herein shall be construed to limit the authority of the Corporation in its contracts for the sale of power to municipalities, to permit or provide for the resale of power at rates which may include an amount to cover tax-equivalent payments to the municipality in lieu of State, county, and municipal taxes upon any distribution system or property owned by the municipality, or any agency thereof, conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes upon any such distribution system or property; it being the intention of Congress that either the municipality or the States in which the municipality is situated shall provide for the proper distribution to the State and county of any protion of tax equivalent so collected by the municipality in lieu of State or county taxes upon any such distribtuion system or property.

The Corporation shall, not later than January 1, 1945, submit to the Congress a report on the operation of the provisions of this section, including a statement of the distribution to the various States and counties hereunder; the effect of the operation of the provisions of this section on State and local finances; an appraisal of the benefits of the program of the Corporation to the States and counties receiving payments hereunder, and the effect of such benefits increasing taxable values within such States and counties; and such other data, information, and recommendations as may be pertinent to future legislation."

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963

[redacted] 107

COFFEE COUNTY, TENNESSEE,
Petitioner,

v.

CITY OF TULLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Tullahoma, Tennessee,
Counsel for Respondent.

July, 1964.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 1137.

COFFEE COUNTY, TENNESSEE,
Petitioner,

v.

CITY OF TULLAHOMA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINIONS BELOW.

The Opinion of the District Court is reported at 204 F. Supp. 794. The Opinions of the Court of Appeals for the Sixth Circuit are reported at 328 F. 2d 683.

JURISDICTION.

Respondent does not dispute the jurisdiction of this Court under 28 U. S. C., Section 1254 (1), but does deny that there are special and important reasons for granting writ of certiorari within the contemplation of this Court's Rule 19.

QUESTION PRESENTED.

Does the Tennessee Valley Authority Act of 1933, as amended, (a) obligate a city operating its own electric distribution system and purchasing power from Tennessee Valley Authority to pay to the county in which the city operates all moneys which the city takes from its distribution system and places in its general fund and which are calculated by applying the county tax rate to the value of the electric distribution properties; and (b) also obligate Tennessee Valley Authority in its contracts with cities for their purchase of electric power to include provisions implementing such statutory obligation?

STATUTE INVOLVED.

The statutory provision involved is the fourth paragraph of Section 13 of the Tennessee Valley Authority Act of 1933, as amended in 1940 (16 U. S. C., Sec. 831 L). Said provision is quoted hereinafter at p. 5 and also in the Petition.

STATEMENT OF THE CASE.

The Opinion of the Court of Appeals contains an adequate and accurate Statement of the Case, which Respondent hereby adopts without reiteration. If any fact not included in such statement is hereinafter stated, it will be undisputed in the Record and appropriate citation to the Appendix in the Court of Appeals will be made.

REASONS FOR DENYING THE WRIT.

1. There is not presented an important question of federal law which needs to be settled by this Court, but rather a situation where a United States Circuit Court and a federal agency have agreed as to the proper interpretation of a federal statute being administered by the agency.

2. The Court of Appeals for the Sixth Circuit correctly decided the only question presented.

SUMMARY OF ARGUMENT.

An amendment adopted in 1940 to the Tennessee Valley Authority Act of 1933 was intended primarily to make clear that the same amendment when dealing with payments of tax equivalent by the Tennessee Valley Authority to states and counties should not be construed to impair or interfere with the Authority's existing discretion under the other provision to permit or provide for such tax equivalent payments by a municipality and to preserve and continue intact discretion of the Authority pursuant to which it had uniformly left the matter of distribution of tax equivalents between counties and cities entirely to states or municipalities concerned.

The Authority has no duty with reference to proper distribution by a municipality of tax equivalent payments received by it from its electric distribution system, and such distribution is to be determined exclusively by the state itself. In the absence of action by the state, the municipality is entitled to retain the entire fund representing tax equivalent payments, so that no action based on federal law lies on the part of the county to recover all or any portion of such payments.

Congress in enacting the Tennessee Valley Authority Act and amendments thereto was not attempting to change the basic relationship between the federal and state governments. The provision in the Authority's power contracts covering tax equivalent payments by the municipal electric distributor to the municipality is not a grant of authority by the Authority to the municipality. Such provision is a limitation which the municipality voluntarily accepts on the use which it can make of its own revenues and in the absence of this limitation the municipality could divert any surplus power revenues it wished to its general funds.

The background and legislative history of the amendment in 1940 to the Tennessee Valley Authority Act supports the interpretation thereof adopted by the majority opinion of the Court of Appeals and hereinabove outlined. Such legislative history is an accepted aid in the interpretation of a federal statute and frequently is determinative of its meaning. An ambiguous floor amendment to a bill will not be construed as giving the bill a broader meaning than was indicated by the original version, or by the committee report or by the floor debate.

The statutory amendment under consideration has been given a consistent and long-continued interpretation by the federal agency charged with its administration which is in accord with the interpretation thereof by the Court of Appeals. Such administrative interpretation of the statute is important and entitled to considerable weight.

Where the interpretation of the statute by the administrative agency was reported to Congress in accordance with a specific statutory directive and such interpretation has been brought to the attention of Congress repeatedly by annual reports of the agency, failure of Congress to act over a long period is an important, if not controlling, factor in support of the interpretation adopted by the administrative agency.

ARGUMENT.

The question in this case turns upon a single paragraph, being part of an amendment adopted in 1940 completely rewriting Section 13 of the Tennessee Valley Authority Act of 1933, 16 U. S. C. A., Section 831 L, as follows:

> "Nothing herein shall be construed to limit the authority of the Corporation in its contracts for the sale of power to municipalities, to permit or provide for the resale of power at rates which may include an amount to cover tax equivalent payments to the municipality in lieu of State, county and municipal taxes upon any distribution system, or property owned by the municipality, or any agency thereof, conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes upon any such distribution system or property; it being the intention of Congress that either the municipality or the State in which the municipality is situated shall provide for the proper distribution to the State and county of any portion of tax equivalent so collected by the municipality in lieu of State or County taxes upon any such distribution system or property."

The opinion of the United States Court of Appeals is a clear and cogent statement of convincing reasons for the interpretation of such statutory provision which the opinion adopts and expounds. Such amendment was intended primarily to make clear that the same amendment in dealing with payments of tax equivalents by Tennessee Valley Authority to states and counties should not be construed to impair or interfere with the Authority's existing discretion under other provisions to permit or provide for such tax equivalent payments by municipality and to preserve and continue intact discretion of the Authority pur-

suant to which it had uniformly left the matter of distribution of tax equivalents between cities and counties to states or municipalities concerned.

Under this interpretation, TVA has no duty with reference to the proper distribution by a municipality of tax equivalent payments received by it from its electric distribution system and such distribution is to be determined exclusively by the state or by the municipality itself; and in the absence of action by the state itself, the municipality is entitled to retain the entire fund representing tax equivalent payments, so that no action lies on the part of the county to recover any part of such payments. To such opinion we add only the following comments:

The Philosophy of the TVA Act.

Congress, in enacting the TVA Act, was not attempting to change the basic relationship between the federal and state governments. The contracts under which TVA sells power to municipalities are wholesale power-supply contracts entered into at arm's length. The validity of such a contract is dependent, not only on the authority conferred upon TVA by federal law, but also on a grant of the necessary authority to the municipality under state law; the municipality is a creature of the state, and in entering into such a contract it exercises authority granted to it by the state. TVA may decline to sell power if a municipality is unwilling or unable to accept the conditions which TVA considers necessary to accomplish the congressional objectives, but it cannot require a municipality to accept such provisions nor can it require the state to permit their acceptance. See **City of Middlesboro v. Kentucky Utilities Co.**, 146 S. W. 2d 48 (Ky. 1940); **Johnson v. State**, 128 S. E. 2d 651 (Ga. App. 1962).

The power generated at the various TVA installations is property of the United States within the meaning of

the property clause of the Constitution[1] **Ashwander v. Tennessee Valley Authority,** 297 U. S. 288 (1936). In the TVA Act Congress authorized TVA to dispose of this power for the benefit of the people of the section as a whole. This was to be accomplished by distributing power at the lowest possible rates in such manner as to increase the domestic and rural use of electricity (TVA Act, Sec. 11). Electric power was recognized as a tool to be used for the economic and social development of the area (**Cf.** TVA Act, Sec. 22). To accomplish the objectives of the act, Congress gave the TVA Board broad discretion as to the provisions which it might include in its wholesale power contracts. Thus section 10 authorizes the Board to include in contracts for the sale of power "such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as **in its judgment** may be necessary or desirable for carrying out the purposes of this Act." (Emphasis added.)

One of the historical problems of municipal distribution of electric power has been the pressure to maintain high rates and drain off the revenues for general municipal purposes. Congress recognized that it was necessary to authorize the TVA Board to include in its contracts provisions which would prevent this from being done if its purpose of bringing about expanding use of electric power through low rates was to be accomplished, but Congress left the TVA Board free to determine what type of contractual provisions should be used. TVA elected to include limitations on the use which a municipality might make of its power revenues, but it was under no compulsion to do so. It might appropriately have decided that limitations on resale rates were, of themselves, adequate

[1] "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States" (Art. IV, Sec. 3, cl. 2).

to prevent the dissipation of revenues, and that it should accordingly enter into contracts which did not restrict in any way the rights of the municipalities to use their revenues. If this course had been followed there would be no dollars of municipal power revenues earmarked for in-lieu tax payments. Would a court then feel called upon to determine what amount should be considered to be in-lieu tax payments and allocate that amount between payments in lieu of city taxes and payments in lieu of county taxes? And what would happen if the rates produced surplus revenues beyond the amount which the court considered to be proper for in-lieu tax payments? Would the court decree some kind of allocation of the excess amounts between the state and the county?

It seems to us that these questions answer themselves. The provision in TVA's power contracts covering in-lieu tax payments is not a grant of authority by TVA to the municipality. It is a limitation which the municipality voluntarily accepts on the use which it can make of its own revenues. In the absence of this limitation, the city could divert any surplus power revenues it wished to its general funds without earmarking any portion as in lieu of taxes or giving any consideration to whether it was taking more or less than a reasonable amount in lieu of taxes. This, indeed, was the course which had been followed by Tullahoma and other municipalities which operated their own distribution systems before they contracted to obtain power from TVA.

A construction of section 13 which would require that TVA compel municipalities to make in-lieu tax payments to counties would do violence to a basic principle underlying the TVA Act—that the TVA Board should be entrusted with broad discretion in effectuating congressional policies and then held accountable for results. Only in rare instances does the act use mandatory language. In-

stead, Congress has set out the general objectives and policies which it wishes the TVA Board to effectuate, but it has left to the TVA Board wide discretion as to the use of means.[2]

TVA was created to work for the development of the natural resources of the region in cooperation with state and local agencies[3] and its Board of Directors has always been acutely conscious of the importance of not intruding in matters which are essentially the concern of state or local interests. In such matters TVA's function is to furnish advice and technical assistance, to suggest what might be done, but not to interfere with the right of local people to make their own decisions.

As was said in brief of the Tennessee Valley Authority filed as *amicus curiae* in the Court of Appeals:

> ". . . TVA has urged municipalities to make a reasonable distribution of tax-equivalent payments. It has also encouraged the municipalities and counties to seek legislation providing for an equitable distribution of such payments. It has not considered, however, that it should try to dictate to a municipality what is a proper distribution or to require that such distribution be made. The TVA Board feels very strongly that any such action on its part would be an intrusion

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[2] As stated by the House members of the congressional conference committee which wrote the final version of the original TVA Act: "We are fully persuaded that the full success of the Tennessee Valley development project will depend more upon the ability, vision, and executive capacity of the members of the board than upon legislative provisions. We have sought to set up a legislative framework, but not to encase it in a legislative straitjacket. . . . We have indicated the course it shall take, but have not directed the particular steps it shall make" (H. R. Rep. No. 130, 73d Cong., 1st Sess. 19 (1933)). Cf. *United States ex rel. Tennessee Valley Authority v. Welch*, 327 U. S. 546 (1946).

[3] See, for example, sections 5 (c), (e), 10, and 22 of the TVA Act.

into a matter which is properly one for determination by the State of Tennessee and its affected local subdivisions, and that such an intrusion by TVA would tend to disrupt the relationship of trust and confidence between TVA and the local distributors of electric power, on which the success of the power program so largely depends."

Background and Legislative History of the 1940 Amendment.

The provisions in TVA power contracts controlling the use of revenues by municipalities antedate the 1940 amendment. The in-lieu tax provision included in the contracts entered into prior to the 1940 amendment was basically the same as the one in the Tullahoma contract.

In TVA's contracts with municipalities, the specific purposes for which revenues may be used are set out and the municipality is required to use all surplus revenues as a basis for the reduction of rates. The standard form of contract has been revised from time to time through the years but the basic nature of these provisions has remained unchanged. Their purpose is to make certain that the revenues of the municipality do not find their way into extraneous channels but are used only for the operation of the electric system. The provisions dealing with in-lieu tax payments, as already noted, are not a grant of authority from TVA to the municipality but a limitation on the amount of money which can be taken into the general funds of the municipality.

Section 13 of the TVA Act, as originally enacted in 1933, provided only for in-lieu tax payments by TVA to the states of Alabama and Tennessee (48 Stat. 66). In 1939 TVA acquired various generating and transmission facilities of a number of private power companies, while at the same time distribution facilities

belonging to such companies were acquired by municipalities and cooperatives. The 1940 amendment to section 13 was an effort to provide for in-lieu tax payments **by TVA** which would be more equitable and more equitably distributed among and within the various states in which TVA operates.[4]

The original version of this legislation, contained in S. 2925 as originally introduced in the 75th Congress, provided that TVA should make payments only to the states, leaving to the states the function of distributing the payments among counties and other subdivisions (48a-51a, Amendment to TVA Act Proposed by S. 2925). This bill contained the following two paragraphs:

> The payments above provided shall in each case be made to the State not later than July 31 of each year, and it is the intention of the Congress that each State shall redistribute said payments or a portion thereof to counties and other local taxing districts affected by the program of the Corporations.
>
> It is likewise intended that each of the said States shall in like manner redistribute all payments made in lieu of taxation paid to municipalities by municipal authorities as provided in contracts made for the purchase of power from the Corporation (50a, Amendment to TVA Act Proposed by S. 2925).[5]

The first paragraph refers to the redistribution by the states of the payments made by TVA. Nowhere in the

---

[4] "The object of the bill is to provide that the Tennessee Valley Authority shall pay in lieu of taxes on all property allocated to power an amount equal to what would be paid as taxes on said property if the same were privately owned" (54a, Excerpts from Committee Report on S. 2925).

[5] The clause "as provided in contracts made for the purchase of power from the Corporation" clearly modifies the word "paid" and not the word "redistribute". Such contracts contained no provision relating to redistribution (TVA-4-6, Contract with City of Athens).

bill was there any indication as to how these payments should be distributed and it was clearly the intent of its sponsor, Senator Norris, that the redistribution be left entirely to the discretion of the states. The second paragraph relates to municipal in-lieu tax payments, and it is equally clear that there was no intention to legislate as to the redistribution of these payments.

A subcommittee of the Senate Committee on Agriculture and Forestry, with Senator Norris (who introduced S. 2925) as Chairman, held a hearing with respect to S. 2925. At this hearing, in the course of colloquies Senator Norris made clear that it had always been "the real intention" of Congress that the states should divide with their political subdivisions the tax equivalents received by such states from TVA and that Congress also expected the states to pass laws with respect to the division of the "tax equivalents" which cities take from their municipal electric systems. He made clear that this, coupled with the earlier failure of the states to act, explained the admonitory features of S. 2925 (being the second paragraph of S. 2925 above quoted), that with respect to distribution or division of such tax equivalents Congress can declare "the intention of Congress", but it "cannot legislate on that, being a state matter." Mr. Fitts, then general counsel of TVA, expressed his agreement with Senator Norris.

At such hearing, Senator Norris also indicated his understanding that where the states do not require a municipality to divide its tax equivalents, then "the municipality naturally keeps it all" but, said Senator Norris, Congress "can put out of the picture" that matter because "the state has the power and the means" for dealing with it.

At the committee hearing another colloquy took place between Senator Norris and Mr. Lapsley, who was coun-

sel for the State Revenue Department of Alabama, as follows:

> Senator Norris: Nor the State either. Now, that is one of the difficulties we wanted to rectify and have put in this bill. While we cannot legislate on that, being a State matter, we have gone so far as to state in here that it is the intention of Congress, which we did not state originally—it is the intention of Congress to do that very thing.
>
> Mr. Lapsley. Well, Mr. Chairman, you state that it is the intention of Congress that the State shall do what I had in mind, but you do not express the intention of Congress that the cities with whom T. V. A. contracts shall do the same thing.
>
> Senator Norris: Oh, yes; the States could provide by statute that when any municipality received anything in lieu of taxation, it should be subdivided just the same as though it was taxes—which we cannot say (**Hearing on S. 2925 Before a Subcommittee of the Senate Committee on Agriculture and Forestry**, 76th Cong., 3d Sess. 33 (1940)).

Thus, again there was a colloquy demonstrating Senator Norris' conviction which he had earlier expressed that Congress could not legislate directly on the distribution of payments by municipalities.

As reported to the Senate from committee, the bill provided that a portion of the TVA payments should be made directly to the counties. This required elimination of the paragraph dealing with the redistribution of such payments by the states, and revision of the paragraph dealing with municipal tax-equivalent payments. The latter paragraph was revised to read as follows:[6]

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[6] To show changes made we have italicized the words which were added and marked through the words which were deleted.

> It is ~~likewise~~ intended *by Congress* that each of the said States shall ~~in like manner redistribute~~ *distribute* all payments made in lieu of taxation paid to municipalities by municipal authorities as provided in contracts made for the purchase of power from the Corporation (86 Cong. Rec. 5247 (1940)).

This revision was clearly not intended to change the meaning of the paragraph.

The language involved in this litigation was substituted for the language quoted above by an amendment offered on the floor of the Senate by Senator Hill of Alabama. The only discussion of the amendment when it was offered and adopted was the following:

> Mr. Hill: I understand that this amendment also is agreeable to the Senator from Nebraska.
>
> Mr. Norris: Yes; I see no objection to it, and in fact I think it is a very good amendment (Ibid.).

There was no debate and no indication that there was any understanding on the part of anyone that this language was intended to have any far-reaching effect. Prior to the acceptance of these amendments, Senator Norris received a letter from the general counsel of Tennessee Valley Authority advising him that **"they in no way alter the substance of the bill as reported."**[7] The amendment was offered and accepted on the evident assumption that it presented no policy or legislative problem worthy of being called to the attention of the Senate (Cong. Rec., Vol. 86, Part 5, p. 5247, April 30, 1940). Petitioner makes no contention, and there would be no basis for such contention if made, that any language or provision in the original TVA Act or in S. 2925 prior to this "minor per-

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[7] The complete letter, dated April 3, 1940, is quoted on Page 11 of the Petition for the Writ herein filed.

fecting" amendment obligated a municipality operating its own electric system and purchasing power from TVA to make any payment or distribution of its moneys to a county. Prior to the adoption of S. 2925, with its minor perfecting amendments, the sponsor of the bill and chairman of the sub-committee which recommended such amendments was advised by TVA's general counsel that they did not alter the substance of the bill and the bill without this amendment cannot be interpreted as Petitioner now contends for.

When the committee recommended S. 2925 for passage, it filed a committee report referring to the object of the bill as requiring payments by TVA. It analyzed the bill, step by step, pointing out all changes in existing laws and nowhere did the report state or intimate that the bill changed the existing law so as to require cities to share their revenues with counties.

H. R. 7424, the House counterpart of S. 2925, was not considered on the floor of the House of Representatives for the reason that the House Committee on Military Affairs, after hearing, voted to table this legislation (Hearings before the Committee on Military Affairs, House of Representatives, 76th Congress, 3rd Sess., on H. R. 7424 and other bills to amend the TVA Act of 1933, January and February, 1940). Thereupon the Senate Appropriations Committee included the language of S. 2925 as previously passed by the Senate, including the amendment offered by Senator Hill, as a rider (Section 39) to the Emergency Relief Appropriations Act, 1941.

Before the subcommittee of the Committee on Appropriations which was considering the Emergency Relief Appropriation Act, 1941, numerous Senators and Representatives testified in support of inclusion of the language of S. 2925, but not one even mentioned the problem of muni-

cipal tax distribution or referred to the paragraph added on this subject (Hearing before the Senate Committee on Appropriations, 76th Cong., 3rd Sess., on H. J. Res. 544, pages 149-162, May 30, 1940). The report of the Senate Committee on Appropriations made no reference to the paragraph added by Senator Hill's amendment, but merely described the new section as authorizing "the Tennessee Valley Authority to make payments to certain States and local governments in lieu of taxation from the gross proceeds derived by the Corporation" (Report No. 1754, Calendar No. 1840, Senate Committee on Appropriations, 76th Congress, 3rd Sess., June 5, 1940, p. 9).

The Senate passed the Emergency Relief Appropriations Act, 1941, without any discussion of Section 39 (Cong. Rec., Vol. 86, Part 5, p. 8076, June 12, 1940). When Section 39 of the Emergency Relief Appropriations Act, 1941, was discussed in the House, discussion was confined to tax equivalent payments by TVA itself (Cong. Rec., Vol. 86, Part 8, p. 8868, June 21, 1940).

It thus appears that at no stage in the history of this legislation was either House of Congress or any committee apprised that there was any contemplation that the language it was adopting would constitute a mandate to the cities purchasing power from TVA to make payments to the counties in which they operated electric systems.

To such situation the holding of this Court in **United States v. American Trucking Assn.**, 310 U. S. 534, 546-549 is applicable where the effort was made and rejected to construe a floor amendment as giving a bill a broader meaning than the original version or the Committee report or the floor debate indicated.

The Opinion of the Court of Appeals summarizes its conclusion as to legislative history, thus:

> "It thus would appear that the sponsors of the amendment had no thought or intention that Congress

itself was directly legislating to impose mandatorily on TVA, or upon the states or municipalities, the duty or obligation to provide for distribution of municipal in lieu tax payments to the counties. As Senator Norris clearly stated, it was his view that Congress could not so legislate and that this was a matter of local or state control. If the amendment presented on the Senate floor, which was finally enacted, had been intended to have a different and more far-reaching effect to the extent that Congress itself should directly legislate to impose duties in this respect, it seems obvious that Senator Norris would not have stated that 'it is a very good amendment,' and Senator Hill would not have described it as a 'minor perfecting' amendment."

Language of the Paragraph Here Involved.

It will be noted that the single paragraph upon which Petitioner relies in the lengthy amendatory act of 1940 begins with the words "Nothing herein shall be construed to limit the authority of (TVA)." It is a grammatical impossibility to find in a sentence with such a beginning a mandatory requirement that cities shall share with counties revenues of municipal electric systems, and a limitation upon the power of TVA to make other contracts. Yet Petitioner must contend that the sentence which disclaims an intention to limit TVA is the one sentence which does so!

The authority of TVA which is not to be construed as limited is the authority to make contracts which "**permit or provide** for the resale of power at rates which may include an amount to cover tax equivalent payments . . ." TVA is not directed to include resale rate schedules in its power contracts. TVA is not directed in any such resale rates schedules to require tax equivalents. The contracts

may **permit** such re-sale rates or the contracts may **provide** for them. The entire discretion is left with TVA to exercise the full extent of authority previously given by Section 10, as amended.

The re-sale rates which TVA may "permit or provide for" are rates "which may include an amount to cover tax equivalent payments to the **municipality** in lieu of State, county and municipal taxes upon any distribution system . . ." **The tax equivalent payments dealt with by this paragraph are not tax equivalent payments to the State or to the county, but only tax equivalent payments to the municipality.**

There come next the words "conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes . . ." These words cannot be isolated from the context of which they are a part. TVA may provide for re-sale rate schedules which include tax equivalents. TVA may condition the inclusion of tax equivalents upon their proper distribution. This, we respectfully insist, is the grammatical import of the words used.

The essential point is that this paragraph does not define "proper distribution" to be "proportionate allocation." "Proper distribution" is general language which recognizes that some constituted authority must make a decision as to what is proper, that is, reasonable. The constituted authority in this situation is emphatically neither Congress nor TVA, but it is either the local government operating the electric distribution system (the City) or it is the State speaking through its legislative body.

The Act of Congress in which is included the paragraph under analysis recognizes as a specific part of this paragraph that proper distribution of the tax equivalent is the

right and function of either the State or the municipality and that this is a matter for local decision. Immediately following the phrase "conditioned upon a proper distribution" we have language clearly negating the suggestion that Congress was itself defining "proper distribution" or even was authorizing TVA to do so, as follows:

> "it being the intention of Congress that either the municipality or the State in which the municipality is situated shall provide for the proper distribution" (of the tax equivalent).

Administrative and Contemporaneous Interpretation.

The interpretation given a statute by those charged with its administration is entitled to considerable weight. **County of Martin v. United States**, 356 U. S. 419; **Billings v. Truesdell**, 321 U. S. 542; **United States v. American Trucking Assn.**, 310 U. S. 534. The record leaves no escape from the conclusion which the Court of Appeals reached that TVA has consistently interpreted the amendment of 1940 to Section 13 in accordance with the views set forth in its Brief as *amicus curiae* in the Court of Appeals. See Appellant's Appendix in that Court, pages 5a, 19a-28a, 37a.

TVA, in its Brief as *amicus curiae* in the Court of Appeals, said:

> ". . . At that time, when the circumstances leading to its adoption were fresh in the minds of the TVA Board, the TVA Board construed this provision as a recognition by the Congress that the distribution of tax equivalents between a municipality and a county is a matter of state policy to be determined either by the state legislature, or, in the absence of state legislation, by the municipality itself; as notification by the Congress to the states and municipalities of its

views that such distribution should be made, and to the counties that they must seek relief through state and local channels rather than through the Congress; and as reaffirming TVA's authority to condition resale rates upon a proper distribution by the municipality of any amounts collected in lieu of state or county taxes but not, as was held by the court below, as directing TVA to include in its power contracts with municipalities provisions requiring such distribution.

"TVA has consistently adhered to this construction with the full knowledge and acquiescence of the Congress. . . ."

Also the following facts were established in the record:

1. In the negotiations by TVA with the cities concerning power contracts, the cities have been advised by representatives of TVA that they might retain all the tax equivalents if they wished.

2. Some of the cities which entered into contracts for TVA power previously operated their own distribution systems and in no case did these cities share their tax equivalents with counties. Generally, these cities, taking all tax equivalents possible under the TVA contract, including the so-called county tax equivalents, would receive less than they received prior to such contract.

3. Not one of the thirty-one municipal distributors in Alabama and in Mississippi share its tax equivalents with the respective county. Kentucky has a state statute which requires its cities to share their tax equivalents with their counties. Of the fifty-seven municipal distributors in Tennessee, twelve make a distribution to counties. Some of these act under special legislation which requires it. One, and only one, of the distributors is known to make a payment to the county without special legislation.

4. TVA in all of its power contracts with cities, except in Kentucky which has a state statute on the subject, permits the city to take the total tax equivalent and place the same in the city's general fund without sharing the same with the county.

The construction of the statute by TVA has also been clearly evidenced by a special report which it filed with Congress in December, 1944, and also by annual reports which it files with Congress covering TVA's operations during each fiscal year. The contents of such reports, to the extent not in the record, are subject to judicial notice. **Tempel v. United States**, 248 U. S. 121, 130; **Fletcher v. Jones**, 105 F. 2d 58, 61-62 (D. C. Cir. 1939); **Slack v. Atlantic White Tower System, Inc.**, 181 F. Supp. 124, 126 (D. Md. 1960).

The concluding paragraph of the 1940 Amendment to Section 13 of the TVA Act directs TVA, not later than January 1, 1945, to submit to Congress a report on the operation of its provisions. The report was entitled "Report on Section 13 of the TVA Act," was transmitted on December 22, 1944 by the TVA Board to the Congress and consisted of 136 pages devoted entirely to the background and operation of Section 13 as rewritten in 1940. Relevant excerpts from this report are printed in the record, Appellant's Appendix in Court of Appeals, pages 24a-26a.

Such report established the following facts: (a) TVA's interpretation of the amendatory act was (and consistently has been) in the absence of state legislation or special local agreements to the contrary, the entire tax equivalents may be kept, and usually are kept, by the municipality operating the distribution system; and (b) Congress, pursuant to its directive that it be informed by report from TVA concerning "the operation of the provisions of this

section" was advised of TVA's interpretation and of the practices of cities generally, and (c) Congress has acquiesced in such interpretation by failure to alter or amend the law subsequent to the required report.

Annual reports are filed by the TVA Board with Congress pursuant to an express requirement contained in section 9 (a) of the TVA Act. Section 14 of the act further requires that each such annual report contain copies of all power contracts entered into by TVA during the year. All of TVA's annual reports since 1940, except those for fiscal years 1942, 1952 and 1953, have contained copies of one or more power contracts with municipalities. These contracts, like the one involved in this case, include provisions clearly showing the TVA Board's construction of the relevant portion of section 13.

Congress, being thus advised in a special report and in successive annual reports of the TVA Board's construction, has never questioned it, and, although the TVA Act has been amended no less than seven times since 1940, Congress has taken no action to overturn TVA's construction of section 13.

CONCLUSION.

For the foregoing reasons it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Certificate of Service.

I certify that copy of this Brief has been served by mail on Petitioner's counsel of record in compliance with Rule 33 (1), this 1st day of July, 1964.

Edwin F. Hunt

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 107

COFFEE COUNTY, TENNESSEE, PETITIONER

v.

CITY OF TULLAHOMA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the order of the Court, dated October 12, 1964, inviting the Solicitor General to file a brief expressing the views of the United States.

OPINIONS BELOW

The opinion of the district court is reported at 204 F. Supp. 794. The majority and dissenting opinions of the court of appeals (Pet. App. 1a–22a) [1] are reported at 328 F. 2d 683.

[1] "Pet. App." refers to the appendix to the petition for certiorari.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1964. The petition for a writ of certiorari was filed on May 20, 1964. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the absence of any provision of State or local law or provision in its contract with the Tennessee Valley Authority so requiring, a municipality which operates its own electric distribution system and purchases power from the Tennessee Valley Authority is obligated to distribute to a county in which the system operates that portion of tax-equivalent payments transferred from the revenues of the system to the municipality's general fund which is calculated by applying the county's tax rate to the value of the system's property.

STATUTES INVOLVED

Section 13 of the Tennessee Valley Authority Act of 1933, 48 Stat. 58, 66, as amended June 26, 1940, 54 Stat. 626 (16 U.S.C. 831*l*) provides as follows:

> In order to render financial assistance to those States and local governments in which the power operations of the Corporation are carried on and in which the Corporation has acquired properties previously subject to State and local taxation, the board is authorized and directed to pay to said States, and the counties therein, for each fiscal year, beginning July 1, 1940, the following percentages of the gross proceeds derived from the sale of power by the Cor-

poration for the preceding fiscal year as hereinafter provided, together with such amounts as may be payable pursuant to the provisions hereinafter set forth, said payments to constitute a charge against the power operations of the Corporation: For the fiscal year (beginning July 1) 1940, 10 per centum; 1941, 9 per centum; 1942, 8 per centum; 1943, 7½ per centum; 1944, 7 per centum; 1945, 6½ per centum; 1946, 6 per centum; 1947, 5½ per centum; 1948 and each fiscal year thereafter, 5 per centum. "Gross proceeds," as used in this section, is defined as the total gross proceeds derived by the Corporation from the sale of power for the preceding fiscal year, excluding power used by the Corporation or sold or delivered to any other department or agency of the Government of the United States for any purpose other than the resale thereof. The payments herein authorized are in lieu of taxation, and the Corporation, its property, franchises and income, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision or district thereof.

The payment for each fiscal year shall be apportioned among said States in the following manner: One-half of said payment shall be apportioned by paying to each State the percentage thereof which the gross proceeds of the power sales by the Corporation within said State during the preceding fiscal year bears to the total gross proceeds from all power sales by the Corporation during the preceding fiscal year; the remaining one-half of said payment shall be apportioned by paying to each State

the percentage thereof which the book value of the power property held by the Corporation within said State at the end of the preceding fiscal year bears to the total book value of all such property held by the Corporation on the same date. The book value of power property shall include that portion of the investment allocated or estimated to be allocable to power: *Provided,* That the minimum annual payment to each State (including payments to counties therein) shall not be less than an amount equal to the two-year average of the State and local ad valorem property taxes levied against power property purchased and operated by the Corporation in said State and against that portion of reservoir lands related to dams constructed by or on behalf of the United States Government and held or operated by the Corporation and allocated or estimated to be allocable to power. The said two-year average shall be calculated for the last two tax years during which said property was privately owned and operated or said land was privately owned: *Provided further,* That the minimum annual payment to each State in which the Corporation owns and operates power property (including payments to counties therein) shall not be less than $10,000 in any case: *Provided further,* That the corporation shall pay directly to the respective counties the two-year average of county ad valorem property taxes (including taxes levied by taxing districts within the respective counties) upon power property and reservoir lands allocable to power, determined as above provided, and all payments to any such county within a State shall be de-

ducted from the payment otherwise due to such State under the provisions of this section. The determination of the board of the amounts due hereunder to the respective States and counties shall be final.

The payments above provided shall in each case be made to the State or county in equal monthly installments beginning not later than July 31, 1940.

Nothing herein shall be construed to limit the authority of the Corporation in its contracts for the sale of power to municipalities, to permit or provide for the resale of power at rates which may include an amount to cover tax-equivalent payments to the municipality in lieu of State, county, and municipal taxes upon any distribution system or property owned by the municipality, or any agency thereof, conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes upon any such distribution system or property; it being the intention of Congress that either the municipality or the State in which the municipality is situated shall provide for the proper distribution to the State and county of any portion of tax equivalent so collected by the municipality in lieu of State or county taxes upon any such distribution system or property.

The Corporation shall, not later than January 1, 1945, submit to the Congress a report on the operation of the provisions of this section, including a statement of the distribution to the various States and counties hereunder; the effect of the operation of the provisions of this section on State and local finances; an ap-

> praisal of the benefits of the program of the Corporation to the States and counties receiving payments hereunder, and the effect of such benefits in increasing taxable values within such States and counties; and such other data, information, and recommendations as may be pertinent to future legislation.

The provisions of Section 13 as originally enacted, 48 Stat. 58, 66, are set out in Appendix B, *infra,* p. 25).

STATEMENT

The City of Tullahoma, Tennessee (hereafter "City") operates its own electric power distribution system, for which it purchases electric power from TVA pursuant to a contract entered into in 1947. The contract obligates the City not to take out of surplus revenues of the distribution system and place in its general funds an amount "in lieu of taxes" in excess of that calculated by applying the municipal, county, and State property tax rates to the value of the system's property within each of those jurisdictions.

The City transferred from revenues of the distribution system to its general funds the full amount of tax-equivalent payments permitted by the contract. In 1959, Coffee County (hereafter "County") demanded that the City pay over to it the portion of such payments for 1959 which were based on the application of the County's tax rate, amounting to

$27,892.76. The City denied the County's claim and brought this action for a declaratory judgment.[2]

The district court ruled that under the fourth paragraph of Section 13 of the TVA Act, the County was entitled to the amount which it claimed. The court of appeals reversed, one judge dissenting. It held that "[i]n light of the background of the provision, its legislative history, and contemporaneous and long continued administrative interpretation, coupled with the apparent acquiescence by Congress in such interpretation," in the absence of a State or local provision for distribution of tax-equivalent payments transferred into the municipal treasury, "the municipality would be entitled to retain the entire fund representing tax-equivalent payments and no action would lie on the part of the County to recover any part of such payments" (Pet. App. 7a.)

DISCUSSION

The issue presented by this case is of importance both to TVA and to the cities and counties in the area in which TVA power is distributed. However, the

[2] The City filed its action after the decision of the Supreme Court of Tennessee in *Rutherford County* v. *City of Murfreesboro*, 205 Tenn. 362, 326 S.W. 2d 653, certiorari denied, 361 U.S. 919, upholding a claim of the kind which the County asserts here. In an earlier case involving a contract entered into before the enactment of the 1940 amendment to Section 13 of the TVA Act, a similar claim had been rejected. *Rutherford County* v. *City of Murfreesboro*, 202 Tenn. 455, 304 S.W. 2d 635.

government believes that the decision of the court of appeals is correct and therefore does not urge further review.[3]

1. *The Language of the Statute.*—There is no requirement of State or local law that the City pay over to the County any of the money which it transfers in tax-equivalent payments from the surplus revenues of its electric distribution system to its general funds. Nor does anything in the contract between the City and TVA create such an obligation. The County argues that, nevertheless, the fourth paragraph of Section 13 of the TVA Act obligated the City, upon execution of a contract with TVA providing for the transfer of tax-equivalent payments to the City's general funds, to turn over to the County so much of the transferred payments as were based on application of the County's tax rate to the distribution system's property, and obligated TVA to ensure that this was done. However, the language of

[3] The government recognizes that the decision below is in conflict with the decision of the Supreme Court of Tennesse in the second *Rutherford County* case, *supra*, p. 7, n. 2. However, as pointed out in the opinion below, that case "* * * was disposed by overruling a demurrer filed by the City of Murfreesboro to the bill of complaint of Rutherford County in which a construction of the Amendment was sought. From the opinion it is clear that the Supreme Court did not have before it the facts, so clearly developed in the present case, showing the consistent administrative interpretation of the Amendment by TVA, and the special and annual reports as to the operation of the Amendment made by the TVA Board directly to Congress. Also, an examination of the opinion discloses that the Court did not refer to the legislative history of the Amendment * * *." (Pet. App. 17a–18a.)

Section 13 does not create these affirmative obligations.

The fourth paragraph of the section (*supra*, p. 5) is cast entirely in terms of a confirmation of the authority of TVA to enter into a certain kind of contract and expressly rejects a construction which limits such authority. It declares that nothing in the section "*shall be construed to limit the authority* of the Corporation * * * to permit or provide for the resale of power at rates which may include an amount to cover tax-equivalent payments to the municipality in lieu of State, county, and municipal taxes * * *, conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes * * *" (emphasis added). The County's construction of the statute is thus in direct contradiction of the statutory language.

The permissive language of the fourth paragraph is in marked contrast to the language which Congress used elsewhere in the same section when it did intend to establish specific requirements. In the first paragraph (supra, p. 2), TVA is "authorized and directed" to pay to the States and counties specific percentages of its annual gross proceeds from the sale of power. The second and third paragraphs (supra, pp. 3–5), provide for the apportionment of such payments among the States; establish a minimum annual payment to each State, both on the basis of taxes previously collected and as a fixed amount; provide for direct payments to the counties based on

taxes previously collected by them, and provide that payments shall be made in "equal monthly installments." These provisions differ from those contained in the fourth paragraph not only in the former's use of mandatory language, but also because they establish fixed percentages and amounts to be paid by TVA to the States and counties. The fourth paragraph speaks only of "a *proper distribution* by the municipality * * *" (emphasis added).

Apart from these contrasts, the County's argument that by virtue of Section 13 alone it is entitled to exactly the amount of tax-equivalent payments which are based on an application of the county tax rate reads into the words "proper distribution" a specificity contradicted by the further statement in the fourth paragraph that it is the intention of Congress "*that either the municipality or the State* in which the municipality is situated *shall provide for the proper distribution to the State and county*" (emphasis added) of tax-equivalent payments based on State and county taxes.

The authority to which Congress referred and which it confirmed in the fourth paragraph is that conferred by the third proviso of Section 10 of the TVA Act (16 U.S.C. 831i), added in 1935 (49 Stat. 1076), which authorizes TVA to "include in any contract for the sale of power such terms and conditions, including resale rate schedules, * * * as in its judgment may be necessary or desirable for carrying out the purposes" of the Act. Before 1940, TVA had exercised its authority under Section 10 to prevent municipalities from charging excessive rates for elec-

tric power and using the extra revenues for general municipal purposes.[4] TVA included in its contracts with municipal distributors a provision limiting the tax-equivalents which could be drawn from the electric distribution systems to an amount calculated by applying the municipal, county, and State tax rates to the book value of the electric systems.[5] The municipalities were encouraged to distribute a portion of the amount so collected to the State and counties in which they operated, but were not required to do so. Nor did TVA specify what it would regard as an appropriate distribution. Its position was that these were matters which should be left to State and local law.

The fourth paragraph of Section 13 simply protected the authority of TVA to enter into contracts of this type against any contrary inference which might be drawn from the addition to the Act of provisions entitling the States and counties to payments directly from TVA. In addition, Congress expressed its intention that the municipalities should make a "proper distribution" of the tax-equivalent payments which they received. But it clearly left this matter within the control of the States, expressing no directive either to TVA or to the municipalities.[6]

2. *Legislative History.*—As originally enacted in

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[4] Such a practice would be incompatible with the objective of the TVA Act to provide power for "domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity," Sec. 11, 48 Stat. 64, 65, 16 U.S.C. 831j.

[5] TVA had entered into wholesale power contracts with more than 70 municipalities before the enactment of the present Section 13 in 1940. 1940 TVA Ann. Rep. 26.

[6] What would constitute a "proper distribution" might vary from case to case. For example, county tax rates in Tennessee

1933, Section 13 (App. B, p. 25) authorized tax-equivalent payments only to Alabama and Tennessee, the States in which Wilson Dam and Norris Dam are located.[7] By 1940, TVA had acquired generating and transmission properties in a number of other States. Proposals for legislation to extend the provisions of Section 13 were prepared by TVA with the cooperation of State and local officials, and embodied in identical bills introduced in the 76th Congress (S. 2925; H.R. 7424). The first two paragraphs of the proposed amended Section 13 provided for payments to the States, generally in the same manner as was embodied in the final enactment (see App. C, pp. 27–29). The third and fourth paragraphs read as follows:

> The payments above provided shall in each case be made to the State not later than July 31 of each year, and it is the intention of the Congress that each State shall redistribute said payments or a portion thereof to counties and

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are notoriously high and assessments notoriously low. Were a county paid an amount based on the application of the county tax rate to the full value of the city's electric distribution system, it would receive far more than if the system were assessed like private property. In addition, the proper distribution of tax-equivalent payments might be affected by the apportionment of tax dollars between a particular city and county.

[7] The Act transferred to TVA custody of Dam Numbered 2 (Wilson Dam) in Alabama (Sec. 7, 48 Stat. 63, 16 U.S.C. 381f) and specifically authorized construction of Cove Creek (Norris) Dam in Tennessee (Sec. 17, 48 Stat. 67; see 16 U.S.C. 831p). It also authorized generally the construction of dams and other works in the Tennessee River and its tributaries (Sec. 4(j), 48 Stat. 61, as amended, 16 U.S.C. 831c(j)).

> other local taxing districts affected by the program of the Corporation.
>
> It is likewise intended that each of the said States shall in like manner redistribute all payments made in lieu of taxation paid to municipalities by municipal authorities as provided in contracts made for the purchase of power from the Corporation.

The latter paragraph, which contained the only refence in the proposed amendment to the tax-equivalent payments transferred from municipal distribution systems to the municipalities, clearly displayed Congress' intention to leave the distribution of such payments within each State to the control of the States themselves.

Any doubts on this score are eliminated by an exchange between Senator Norris, who introduced the bill in the Senate, and Mr. William C. Fitts, Jr., general counsel of TVA, during the Senate committee hearings on the bill:

> Senator Norris. Therefore, so far as Congress is concerned, we can put out of the picture the amount of the so-called "tax displacement" that arises from the transfer of these distribution properties, because the State has the power and the means of getting back those taxes that are already being paid. In this bill now pending there is a provision—because the States have not done that in the past—there is a provision here expressing the intention of Congress, and that has always been the intention of Congress.
>
> Mr. Fitts. Correct.

Senator NORRIS. *And while it probably has no legal effect, it rather notifies the States that that is what Congress expects them to do.*

Mr. FITTS. *It is a policy declaration.*

Senator NORRIS. *It is a State matter entirely.*

Mr. FITTS. So that the only problem that this bill attempts to deal with directly, and the only problem that Congress can deal with directly, is the tax loss or displacement on that portion of the properties that are actually owned in the name of the United States.

Senator NORRIS. That is right. [*Hearing on S. 2925 Before a Subcommittee of the Senate Committee on Agriculture and Forestry,* 76th Cong., 3d Sess., p. 9 (1940); emphasis added.]

Senator Norris expressed the same views later in the hearings, during the testimony of Mr. John W. Lapsley, counsel for the Alabama State Revenue Department:

Senator NORRIS. * * * one of the difficulties that exists right now, as I understand it, and that I think is entirely due to the lack of any State law in any State down there, as far as I know—I thought when the original act was passed that the several States would pass laws that would rectify it—for instance, if they pay into a city, city A, let us say, $100,000 in lieu of taxes, it was the intention of Congress, I take it, when it passed the law, or it was the intention of the T.V.A. when it made the contract to sell the power to that municipality A, that it should really be in lieu of taxes, and therefore it should be divided up when it was paid to the city, just the same as though they would have divided it up if it had been pri-

vately owned. Some of it would have gone to the State, some to a school district, and some to other subdivisions. But, as I understand it, the State never passed any law requiring that division, and the municipality, naturally, keeps it all.

Mr. LAPSLEY. Yes, sir.

Senator NORRIS. And the county does not get any of it.

Mr. LAPSLEY. Nor the State either.

Senator NORRIS. Nor the State either. Now, that is one of the difficulties we wanted to rectify and have put in this bill. *While we cannot legislate on that, being a State matter,* we have gone so far as to state in here that it is the intention of Congress, which we did not state originally—it is the intention of Congress to do that very thing.

Mr. LAPSLEY. Well, Mr. Chairman, you state that it is the intention of Congress that the State shall do what I had in mind, but you do not express the intention of Congress that the cities with whom T.V.A. contracts shall do the same thing.

Senator NORRIS. Oh, yes; *the States could provide by statute* that when any municipality received anything in lieu of taxation, it should be subdivided just the same as though it was taxes—*which we cannot say* * * *. [*Id.* at p. 33; emphasis added.] [8]

[8] During the committee hearings, several witnesses expressed the view that Tennessee municipalities were without authority to make payments to the counties under existing state law. See *id.* at p. 24: Hearings on H.R. 7424 (and other similar

As reported to the Senate from committee, S. 2925 provided that a portion of TVA's payments to the States should be made directly to the counties. 86 Cong. Rec. 5238–5239. This change led to the elimination of the statement in the third paragraph of Congress' intent that the States should redistribute a portion of TVA's payments to them to the counties and other "local taxing authorities," *id.* at p. 5239, and to corresponding stylistic changes in the fourth paragraph.[9] The present provisions of the fourth paragraph were inserted in the bill in response to an amendment offered on the Senate floor by Senator Hill of Alabama. *Id.* at p. 5247. The amendment was one of several offered by Senator Hill and described by him as "minor perfecting amendments" involving "no dispute," *id.* at p. 5245. It was accepted without any discussion beyond Senator Norris'

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bills) before the House Committee on Military Affairs, 76th Cong., 3d Sess. pp. 351, 367, 471 (1940). This view was apparently based on the Tennessee Revenue Bond Law (Tenn. Code Ann. 6–1301 *et seq.*) and the Tennessee Municipal Electric Plant Law (Tenn. Code Ann. 6–1501 *et seq.*), both still in force, which specify the purposes for which municipal electric revenues may be used.

[9] The changes made in the fourth paragraph were as follows, words eliminated being marked out and words added being italicized):

"It is ~~likewise~~ intended *by Congress* that each of the said States shall ~~in like manner redistribute~~ *distribute* all payments made in lieu of taxation paid to municipalities by municipal authorities as provided in contracts made for the purchase of power from the Corporation" (86 Cong. Rec. 5247).

statement that he saw "no objection to it" and thought it "a very good amendment." *Id.* at p. 5247.[10]

The bill was passed in this form by the Senate (*id.* at p. 5247), and later enacted as Section 39 of the Emergency Relief Appropriation Act, fiscal year 1941 (54 Stat. 611, 626–627).[11]

The legislative history of Section 13 thus fully supports its construction as only an affirmation of TVA's authority to require in its contracts with municipalities that they distribute tax-equivalent payments as a condition of such payments, and an expression of congressional intent that there be such distribution. It is beyond dispute that the language of the original bill did no more than express this intent. The language of the final enactment replaced that of the original bill with no indication of a change in substance and, indeed, every indication that the substance was unchanged.

3. *Administrative Interpretation.*—TVA has consistently construed Section 13 not to require either that a provision for the distribution of tax-equivalent payments be included in its contracts with municipalities or that the municipalities make such distribution in the absence of such a provision. This construction has repeatedly been communicated to Congress.

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[10] TVA's general counsel had advised Senator Norris by letter dated April 3, 1940 (quoted in full in the Pet. at p. 11) that in his view the proposed amendments did not in any way "alter the substance of the bill as reported."

[11] No bill was reported from committee in the House. The Senate attached the provisions of its bill, as previously passed, to the Emergency Relief Appropriation Bill, 86th Cong. Rec. 8076.

The final paragraph of Section 13 (*supra*, pp. 5–6) required TVA to submit to Congress, not later than January 1, 1945, a report on the operation of its provisions. The report was submitted on December 22, 1944. Included in the discussion under the heading "Tax and In-Lieu Payments by Local Distribution Systems" was the following (p. 25):

> The power contracts and agreements, through which the TVA exercises its responsibilities for the distribution of electric power, make provision for payments by municipal systems in lieu of state and local property taxes. These in-lieu payments are usually computed by applying the current property tax rates of each jurisdiction to the book value of the electric property within such jurisdictions.
>
> In the absence of state legislation or special local agreements to the contrary the entire state and local ad valorem property tax equivalent of each system is paid into the general fund of the owning municipality.

Elsewhere, the same report stated (p. 41):

> Taxes paid by cooperatives go to the states, counties, and cities in which the property is located. On the other hand, the equivalent of the former state and county taxes on municipally owned systems is commonly paid into the general funds of the municipalities owning the systems, and used for various municipal purposes.

In addition to this report dealing specifically with the operation of Section 13, the TVA Act requires TVA to file annual reports (Sec. 9(a), 48 Stat. 63, 16 U.S.C. 831h(a)) with the President and Congress. Such reports must include copies of all power contracts into which TVA has entered during the year (Sec. 14, as amended by 49 Stat. 1077, 16 U.S.C. 831m). Since 1940, every report, except those for fiscal years 1942, 1952 and 1953, has contained copies of at least one power contract with a municipality reflecting TVA's construction of the statute.[12]

Having been regularly advised of TVA's practice under Section 13 of the Act, Congress has never questioned it or taken any steps to amend the statute in this respect, although other provisions have been amended since 1940.[13] If the matter were otherwise doubtful, this clear congressional acquiescence in long-standing administrative practice would be determinative. *E.g., United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396–397; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 311–315.

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[12] See, for example, the provisions of the contract between TVA and the City of Tullahoma, App. A, p. 21, which appeared in the Annual Report for the fiscal year ended June 30, 1948.

[13] *E.g.*, Act of July 18, 1941, 55 Stat. 599; Act of Nov. 21, 1941, 55 Stat. 773; Act of July 12, 1952, 66 Stat. 591.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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DECEMBER 1964.

APPENDIX A

PROVISIONS OF THE AGREEMENT BETWEEN THE TENNESSEE VALLEY AUTHORITY AND THE CITY OF TULLAHOMA ENTERED INTO AS OF THE FIRST DAY OF JULY, 1947

* * * * *

5. *Resale Rates:* In order to assure a wide and ample distribution of electric energy in the area served by Municipality, Authority and Municipality agree as follows:

(a) Municipality agrees that the power purchased hereunder shall be sold and distributed to the ultimate consumer without discrimination between consumers of the same class, and that no discriminatory rate, rebate, or other special concession will be made or given to any consumer.

(b) Municipality agrees to charge consumers, including all municipal and governmental customers and departments, the rates set forth for the several classes thereof in Schedules R, G, and SL of the Schedule of Rates and Charges, and not to depart therefrom except by agreement of the parties. Additional resale schedules for special classes of consumers or special uses of electric energy may be added from time to time by agreement of the parties.

(c) If it should appear that the rates provided for in said resale schedules, including surcharges where applicable, do not produce revenues sufficient to provide for the operation and maintenance of Municipality's electric system on a self-supporting and financially sound basis, including requirements for interest and principal payments on notes, bonds, or other

evidences of long-term indebtedness issued or assumed by Municipality in the acquisition, extension, or improvement of its electric system (hereinafter called the "System Indebtedness"), Authority and Municipality shall agree upon, and Municipality shall put into effect, such changes in rates as will provide for the increased revenues necessary to place the system upon a self-supporting and financially sound basis.

6. *Disposition of Revenues:* Municipality agrees to dispose of its gross revenues from electric operations in the following manner:

(a) Revenues shall first be used for the payment of all current operating expenses, including salaries, wages, cost of materials and supplies, power at wholesale, and insurance.

(b) From remaining revenues Municipality shall next currently provide for the payment at maturity of interest accrued on all System Indebtedness, and for amortization charges and/or sinking fund payments thereon.

(c) Thereafter, revenues shall be used currently to set up reasonable reserves for replacements, new construction, and contingencies, and to provide a reasonable amount of cash working capital.

(d) From remaining revenues Municipality may thereafter pay into its General Fund a return on its investment, as provided in the Financial and Accounting Policy in the Schedule of Terms and Conditions attached hereto.

(e) From remaining revenues Municipality may thereafter pay into its General Fund a tax equivalent as provided in the Financial and Accounting Policy in the Schedule of Terms and Conditions attached hereto.

(f) All remaining revenues shall be considered surplus revenues and shall serve as a basis for the reduction or elimination of surcharges to consumers, and thereafter for the reduction

of rates; provided, however, that Municipality may, subject to the consent of Authority, devote part or all of such surplus revenues to the purchase or retirement of System Indebtedness prior to maturity. Surplus revenues shall be computed as of June 30 of each year.

* * * * *

10. *Purpose of Contract:* It is hereby recognized and declared that, pursuant to the obligations imposed by the Tennessee Valley Authority Act of 1933 as amended, Municipality's operation of a municipal electric distribution system and Authority's wholesale service thereto are undertaken primarily for the benefit of ratepayers and that Municipality shall receive from the operation thereof for the benefit of its General Fund, to be used for any permissible municipal purpose, only (a) a return on any investment made from general funds in the electric system, and (b) an amount in lieu of taxes, representing a fair share of the cost of government properly to be borne by such system. In accordance with these principles, which are mutually recognized as of the essence of this agreement, Municipality agrees to operate its electric system and to maintain its financial accounts and affairs in full and strict accordance with the provisions of this Power Contract.

* * * * *

SCHEDULE OF TERMS AND CONDITIONS

* * * * *

10. *Financial and Accounting Policy:* Municipality agrees to be bound by the following statement of financial and accounting policy:

* * * * *

(c) Payments in Lieu of Taxes. Municipality may take from the electric department revenues or funds for the general funds of Munic-

ipality an amount in lieu of taxes (representing a fair share of the cost of government properly to be borne by its electric distribution system) to be determined subject to the terms and conditions hereafter stated.

(1) To the extent surplus revenues are available after the satisfaction of all items set forth in subsections (a) through (d) of section 6 of the Power Contract, Municipality *may* take from the electric department revenues or funds for the general funds of Municipality an amount calculated by applying the prevailing municipal property tax rate to the value of the property used in electric operations within the municipal limits.

(2) To the extent surplus revenues are available after the satisfaction of all items set forth in subsections (a) through (d) of section 6 of the Power Contract, Municipality may take from the electric department revenues or funds for the general funds of Municipality an amount calculated by applying the prevailing county and State tax rates to the value of the electric system; provided, however, that if Municipality shall, directly or indirectly, and voluntarily or otherwise, make any payment or payments out of electric system revenues or funds to the State and/or any political subdivision thereof other than Municipality in satisfaction of a claim or obligation for taxes or payments in lieu of taxes, or in consideration of or as compensation for franchises or operating rights, then and in such event, and whether or not such payment or payments be measured by taxes or tax values at any time levied or assessed, the county and/or state tax equivalents to which Municipality would otherwise be entitled under this subsection (2) shall be reduced by the amount of such payment or payments; and provided further, that no such pay-

ment shall operate to reduce the tax equivalents to which Municipality is entitled under subsection (1) immediately preceding. It is understood and agreed, however, that Municipality s all not, in respect of any year, voluntarily make or agree to make any payment or payments of the kind referred to in this subsection when such payment or payments, either separably or in conjunction with all other similar payments in respect of that year, voluntary or otherwise, would exceed the amount derived by applying the prevailing county and state tax rates to the value of the electric system.

(3) For the purposes of (1) and (2) above the value of the electric system or any part thereof, shall be the book cost (determined initially as provided in the letter agreement of even date herewith) of the tangible plant attributable to such system or to such part thereof, less the proportion of the depreciation reserve properly allocable thereto as of the date of determination, plus the book cost of materials and supplies in an amount not exceeding a total of $10,000, and working capital in an amount not exceeding a total of $10,000. The said value shall be determined as of the beginning of each taxable year.

* * * * *

APPENDIX B

SECTION 13 OF THE TENNESSEE VALLEY AUTHORITY ACT OF 1933, AS ORIGINALLY ENACTED, 48 STAT. 58, 66

SEC. 13. Five per centum of the gross proceeds received by the board for the sale of power generated at Dam Numbered 2, or from any other hydropower plant hereafter constructed in the State of Alabama, shall be paid to the State of Alabama; and 5 per cen-

tum of the gross proceeds from the sale of power generated at Cove Creek Dam, hereinafter provided for, or any other dam located in the State of Tennessee, shall be paid to the State of Tennessee. Upon the completion of said Cove Creek Dam the board shall ascertain how much additional power is thereby generated at Dam Numbered 2 and at any other dam hereafter constructed by the government of the United States on the Tennessee River, in the State of Alabama, or in the State of Tennessee, and from the gross proceeds of the sale of such additional power 2½ per centum shall be paid to the State of Alabama and 2½ per centum to the State of Tennessee. These percentages shall apply to any other dam that may hereafter be constructed and controlled and operated by the board on the Tennessee River or any of its tributaries, the main purpose of which is to control flood waters and where the development of electric power is incidental to the operation of such flood-control dam. In ascertaining the gross proceeds from the sale of such power upon which a percentage is paid to the States of Alabama and Tennessee, the board shall not take into consideration the proceeds of any power sold or delivered to the Government of the United States, or any department or agency of the Government of the United States, used in the operation of any locks on the Tennessee River or for any experimental purpose, or for the manufacture of fertilizer or any of the ingredients thereof, or for any other governmental purpose: *Provided,* That the percentages to be paid to the States of Alabama and Tennessee, as provided in this section, shall be subject to revision and change by the board, and any new percentages established by the Board, when approved by the President, shall remain in effect until and unless again changed by the board with the ap-

proval of the President. No change of said percentages shall be made more often than once in five years, and no change shall be made without giving to the States of Alabama and Tennessee an opportunity to be heard [48 Stat. 66].

APPENDIX C

S. 2925, INTRODUCED IN THE SENATE BY SENATOR NORRIS ON JULY 31, 1939, 76TH CONGRESS, 1ST SESSION

A BILL To amend the Tennessee Valley Authority Act of 1933.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 13 of the Tennessee Valley Authority Act of 1933 be, and the same is hereby, amended to read as follows:

"SEC. 13. In order to render financial assistance to those States and local governments in which the power operations of the Corporation are carried on and in which the Corporation has acquired properties previously subject to State and local taxation, the board is authorized and directed to pay to said States, for each fiscal year, beginning July 1, 1940, the following percentages of the gross proceeds derived from the sale of power by the Corporation for the preceding fiscal year as hereinafter provided, together with such additional amounts as may be payable pursuant to the provisions hereinafter set forth, said payments to be in lieu of taxes and to constitute a charge against the power operations of the Corporation for the fiscal year then beginning and to be made upon condition that no State, county, or local taxes shall

be assessed or levied against the property, operations, or business of the Corporation: For the fiscal year (beginning July 1, 1940) 10 per centum; 1941, 9 per centum; 1942, 8 per centum; 1943, 7½ per centum; 1944, 7 per centum; 1945, 6½ per centum; 1946, 6 per centum; 1947, 5½ per centum; 1948 and each fiscal year thereafter, 5 per centum. 'Gross proceeds', as used in this section, is defined as the total gross proceeds derived by the Corporation from the sale of power for the preceding fiscal year, excluding power used by the Corporation or sold or delivered to any other department or agency of the Government of the United States.

"The payment for each fiscal year shall be apportioned among said States in the following manner: One-half of said payment shall be apportioned by paying to each State the percentage thereof which the gross proceeds of the power sales by the Corporation within said State during the preceding fiscal year bears to the total gross proceeds from all power sales by the Corporation during the preceding fiscal year; the remaining one-half of said payment shall be apportioned by paying to each State the percentage thereof which the book value of the power property held by the Corporation within said State at the end of the preceding fiscal year bears to the total book value of all such property held by the Corporation on the same date. The book value of power property shall include that portion of the investment allocated or estimated to be allocable to power: *Provided,* That the minimum annual payment to each State shall not be less than the two-year average of the State and local ad valorem property taxes levied against power property purchased and operated by the Corporation in said State plus that portion of reservoir lands related to dams constructed by or on behalf of the

United States Government and allocated or estimated to be allocable to power. The said two-year average shall be calculated for the last two tax years during which said property was privately owned and operated: *Provided, further,* That the minimum annual payment to each State in which the Corporation owns and operates power property shall not be less than $10,000 in any case. The determination of the board of the amounts due hereunder to the respective States shall be final.

"The payments above provided shall in each case be made to the State not later than July 31 of each year, and it is the intention of the Congress that each State shall redistribute said payments or a portion thereof to counties and other local taxing districts affected by the program of the Corporation.

"It is likewise intended that each of the said States shall in like manner redistribute all payments made in lieu of taxation paid to municipalities by municipal authorities as provided in contracts made for the purchase of power from the Corporation.

"The Corporation shall, not later than January 1, 1945, submit to the Congress a report on the operation of the provisions of this section, including a statement of the distribution to the various States hereunder and the redistribution by the States of the amounts paid to them; the effect of the operation of the provisions of this section on State and local finances; an appraisal of the benefits of the program of the Corporation to the States receiving payments hereunder and to the local subdivisions thereof, and the effect of such benefits in increasing taxable values within such States and local subdivisions; and such other data, information, and recommendations as may be pertinent to future legislation."

U.S. GOVERNMENT PRINTING OFFICE: 1944